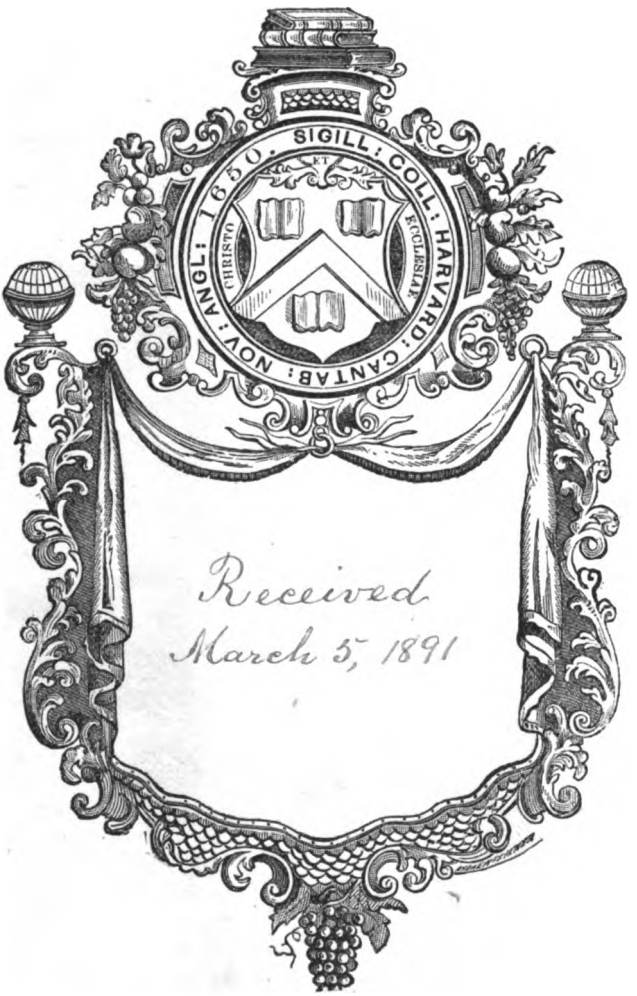
SUPPLEMENT
TO
LINDLEY ON PARTNERSHIP



THE PARTNERSHIP ACT, 1890.

THE

PARTNERSHIP ACT, 1890,

With Notes:

BEING A SUPPLEMENT TO

A TREATISE

ON THE

LAW OF PARTNERSHIP.

BY

THE RIGHT HONOURABLE

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WITH

AN INTRODUCTION AND NOTES ON THE LAW OF SCOTLAND.

BY

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ADDENDA.

PAGE 2, line 6 from bottom *after* "respect," *add*, A summary of the changes made in the English Law of Partnership, and of the doubtful points which have been settled by the present Act will be found *infra*, pp. 115 and 116.

,, 23. *Western National Bank of the City of New York* v. *Perez Triana* (C. A., W. N. 1890, 227). If a firm consists of one or more partners resident abroad, a writ against the firm in the name of the firm should not be issued without leave for service abroad. The action should be brought against the partners, or partner, in England, in their, or his, own names, or name, and be prosecuted accordingly. *Pollexfen* v. *Sibson* (1886), 16 Q. B. D. 792, and *Shepherd* v. *Hirsch Pritchard & Co.* (1890), 45 Ch. D. 231, can no longer be relied upon.

,, 43, note (*g*). Before "p." *add* "*ib.*"

,, 49, line 16. Dele "to," the first word in the line.

SUPPLEMENT

TO THE

LAW OF PARTNERSHIP.

INTRODUCTION.

History of the act.

In 1879, Sir Frederick Pollock drew a bill for the consolidation and amendment of the Law of Partnership. This bill was brought into the House of Commons in 1880, and again with modifications in 1882, 1883, 1884 and 1889. It was ultimately in its amended form taken up by the Government, and although in many respects altered, it was the foundation of the act passed last session and now known as the Partnership act, 1890.

Act not a complete code.

The Partnership act, 1890, is not a complete code of Partnership law; the mode of administering partnership assets in the event of death or bankruptcy is not to be found in the act, neither is there anything in the act relating to goodwill. The act itself provides, by § 46, that existing rules of equity and of common law shall continue in force except so far as they are inconsistent with the express provisions of the act.

Codification by Parliament.

Opinions will naturally differ as to the utility of statutes which deal with important branches of law, but which do not profess to deal with them exhaustively. No doubt an incomplete piece of work is unsatisfactory from whatever point of view it is regarded; but it does not follow that such a work is not worth executing; if it is well done as far as it goes, it may be a great boon; and the present act, although imperfect, has the merit of reducing a mass of law, hitherto undigested except

by private authors, into a series of propositions authoritatively expressed and as carefully considered as any act of Parliament is likely to be.

The Parliament of this country is very ill adapted to the work of codification. It is matter of amazement that Englishmen should be content to have the laws by which they are governed in such an inaccessible shape as they are; but, no doubt, one explanation of this state of things is the hopelessness of passing through Parliament, without mutilation, any carefully considered exposition of any great branch of law. Such an exposition must introduce amendments; for anomalies and irrational rules, though they may exist for centuries if only occasionally brought to light by judicial decision, would inevitably disappear if any attempt were made to formulate and perpetuate them in a legislative enactment. Necessary amendments, however, ought to be carefully considered by men who understand the subjects to which they relate and ought to be adopted by those who do not; but amendments laid before Parliament are very likely to be dealt with by incompetent persons, if not by opposing political parties acting on political party lines; and rather than run such a risk many earnest law reformers prefer to leave things as they are, or at all events not to bring forward measures calculated to arouse opposition. Taken as a whole, the law of England, both civil and criminal, is well adapted to the requirements of English people: but it sadly wants methodising and authoritative revision; and any such revision of any branch of it is a distinct gain. From this point of view the act in question is decidedly useful, although it is by no means a perfect measure, nor even so good as Parliament might have made it.

Alterations in the law.

With one important exception the Partnership act, 1890, introduces no great change in the law. It amends the law in some small particulars, and it removes doubts on one or two controverted points: but, speaking generally, the act makes no important change in the law save in one respect.

Charging orders.

The exception alluded to is the mode of making a partner's share of the partnership assets available for the payment of his separate judgment debts. For many years past the writer of these observations has called attention to the unsatisfactory state of the law on this subject and has suggested the im-

provement which has at length been adopted. A *fi. fa.* founded on a judgment obtained against one partner only can no longer be executed against the goods of the firm: but, following the procedure available in the case of public companies, the separate judgment creditor of a partner can obtain an order charging his interest in the partnership assets with the payment of the judgment debt; and this charge can be enforced by a sale or the appointment of a receiver. The other partners can pay off the judgment creditor and so obtain the benefit of his charge, which in this case the judgment debtor will be entitled to redeem; or if his interest is ordered to be sold they can buy it, and so get rid both of the judgment creditor and of the partner against whom the judgment was obtained (see § 23).

This procedure moreover extends to cost-book companies (§ 23, cl. 4), although in other respects the act does not apply to them (§ 1, cl. 2*c*). It was necessary to refer specially to these companies, because unregistered cost-book mining companies were not within the provisions of the existing statutes relating to charging orders, and unless they had been expressly provided for, the old cumbrous procedure would still have been applicable to them, although abolished as to all other companies and partnerships.

Sub-division of the act.

The act is divided into 5 parts headed—

Nature of Partnership, §§ 1—4.

Relations of Partners to persons dealing with them, §§ 5—18.

Relations of Partners to one another, §§ 19—31.

Dissolution of Partnership and its consequences, §§ 32—44.

Supplemental, §§ 45—50.

Part I. §§ 1—4.

The first four of these parts correspond with the four books into which the author's work on the Law of Partnership is subdivided. The division is one which naturally suggests itself.

Definition.

A definition of the term partnership is given in § 1. Carrying on business with a view to profit is the key to the definition; but as pointed out in § 2 profits may be shared by persons who are not partners.

Bovill's act.

Bovill's act, although repealed by § 48, is in effect re-enacted

by §§ 2 and 3; but it would have been better to have omitted it and to have expressed more emphatically the principle laid down by the House of Lords, in *Cox* v. *Hickman*, and to have left that principle to be practically worked out by the Courts. A loan on the terms that the lender is to share the profits of the borrower does not constitute a partnership if the agreement between the borrower and lender is in writing and signed by them (§ 2, cl. 3, *d*); but what if there is no writing? Is the lender a partner with the borrower? and if not, can the lender compete with the borrower's other creditors in the event of his bankruptcy? (see § 3). *Cox* v. *Hickman* leaves the first of these questions to be determined by the real intention of the parties; and good sense will probably lead the Courts to construe § 3 so as to avoid the absurdity of putting a lender of money without, in a better position than one with, a written agreement for a share of profits.

A firm.

Partners are for the purposes of the act called collectively a firm (§ 4), but the firm is not a corporate body in England. In Scotland a firm is a legal person distinct from the partners of whom it is composed; but each partner can be compelled to pay the debts of the firm (§ 4, cl. 2). The term *firm* as defined in § 4 does not apparently include a person liable to the debts of a firm by holding himself out as a partner in it. Nor does the act contain any provisions relating to legal proceedings by and against a firm for its debts and liabilities. These are governed in England by the rules of the Supreme Court, as to which see "Partnership," pp. 264 *et seq.*

Part II. §§ 5—18.

The second part headed Relations of partners to persons dealing with them, §§ 5—18, contains nothing new. Partnership debts continue to be joint, and not both joint and several as in Scotland (§ 9); but the estate of a deceased partner can be reached by a creditor of the firm as heretofore.

The law as to the liability of a firm for money misapplied by one of its members is compendiously stated in §§ 11 and 13.

The doctrine of liability by holding out is formulated by § 14, and it is expressly declared that liability may attach although the defendant may not have known that the plaintiff was trusting him. But the continued use of a deceased partner's name does not impose liability on his estate.

The liabilities of incoming and outgoing partners are tersely expressed in § 17, and the possible discharge of a retired partner by agreement to be inferred from a course of dealing is prominently alluded to. The act has not altered the law relating to the discharge of one partner by obtaining judgment against another. See "Partnership," p. 254 *et seq.*

Part III. §§ 19—31.

The third part, treating of the relations of partners to one another whilst the firm is a going concern, extends from § 19 to § 31. The cardinal principle here is that the rights of partners *inter se* depend on the agreement into which they may choose to enter, and that such agreement may be inferred from their conduct. This principle is clearly recognised in § 19.

Partnership property.

Partnership property and the interest of each partner therein, are dealt with in §§ 20—22 and 24 (1); and the obligation of every partner to account for profits made by himself is expressed in § 29 and § 30. The legislature has adopted the established rules of equity as to these matters.

The act removes some doubts on minor points. In the absence of special agreement, a right is given to interest on advances though not on capital (§ 24 (3) and (4)); and a majority can bind a minority as to ordinary matters connected with the partnership business (§ 24 (8)). But as before the act so now, a majority cannot change the nature of the business of the firm (§ 24 (8)), nor expel a partner (§ 25) unless expressly authorised so to do.

Assignments and mortgages.

The rights of assignees and mortgagees of shares are dealt with in § 31, and care has been taken to prevent such persons from interfering with the transaction of the business of the firm, and at the same time to secure to them payment of all money to which the assignor would have been entitled if he had not parted with or charged his interest.

Charging orders.

The alteration in the law already noticed (p. 2), substituting a charging order for a *fi. fa.* on a separate judgment against a partner, is effected by § 23; and if a partner's share is charged under this section his co-partners are entitled to have the partnership dissolved (§ 33 (2)).

Part IV. §§ 32—44.

Part IV. treats of dissolution and its consequences, §§ 32—44.

Causes of dissolution.

The causes of dissolution by a partner, as distinguished

from the Court, are enumerated in §§ 32—34. Apart from agreement, there seems to be no right to retire except by dissolving the firm, although retirement in some other way is apparently pointed to or implied: see the marginal heading of § 26, and § 37. This last section may however apply to retirement by agreement.

The power of the Court to decree a dissolution is more extensive than before; for in addition to the old-established grounds for dissolution, enumerated in § 35 (*a*) to (*e*), the Act confers upon the Court the power to dissolve whenever circumstances have arisen which in the opinion of the Court render it just and equitable that the partnership be dissolved (§ 35 (*f*)). These words are very wide, and it is to be hoped that the discretion conferred by them will not be restricted, little by little, by judicial decision. Each case ought to be considered on its own merits; and all the circumstances of each case ought to be weighed.

Advertisement.

The right to advertise a dissolution is recognised in § 37, and the effect of not notifying it is stated in § 36.

The continuance of the powers of partners for the purpose of winding-up the affairs of their dissolved firm is recognised in § 38; and the right of each partner to have its assets realised, its debts and liabilities discharged, the accounts of its members adjusted, and its surplus assets divided, is expressed in § 39.

Premium.

The difficult subject of the apportionment of premiums is dealt with in § 40. No right to any return of premium is given; but in certain specified cases the Court is empowered to order a return of part or even of the whole.

A person induced to become a partner by fraud or misrepresentation, and who rescinds the partnership contract on that ground, is entitled to indemnity, the nature of which is defined with care in § 41.

Continued use of capital.

The act preserves the old equitable doctrine entitling a retired partner, or the representatives of a deceased or bankrupt partner, whose capital is not paid out, to interest at 5 per cent., or, if he or they prefer it, to such a share of profits as can be attributed to the use of his capital, § 42. The difficulty, however, of ascertaining such share is shown by experience to be very great; and it would have been well if the Court had

been empowered to give a higher rate of interest than 5 per cent. instead of a share of profits.

The mode in which the assets are to be applied and the accounts of the partners adjusted is stated in § 44, and is in accordance with the existing law.

Goodwill.

One matter of great practical importance and of some difficulty is unfortunately not dealt with, *i.e.* the goodwill of a dissolved firm and the extent to which, and the persons by whom, the use of its name may be continued. Sir F. Pollock's bill dealt with these points; as did also the bill which passed the House of Commons in 1889 and the bill which was brought into the House of Lords in 1890. But owing, it is believed, to differences of opinion, and to the difficulty of arriving at a conclusion which would be acceptable to both Houses of Parliament, the clauses relating to these subjects were struck out. The law upon them must therefore be extracted from judicial decisions (see § 46), and the doubts and difficulties which beset questions arising on these subjects must remain for future judicial or legislative solution.

Bankruptcy.

Bankruptcy dissolves the firm as before (§ 33 (1)). The Bankruptcy act, 1883, and the Bankruptcy rules of 1886 apply both to joint adjudications against firms and to separate adjudications against their individual members.

Scotland.

The distinctive feature of the law of partnership in Scotland is the separate *persona* of the firm. It is deemed to be a separate person in law, capable of entering into obligations and contracts, of holding personal property, and of carrying on legal proceedings by its distinctive name or firm as its individual appellation. By the law of England and Ireland a private partnership of two or more persons is not recognised separately from the co-partners of whom it is composed. This characteristic of Scottish partnerships is preserved by the fourth section of the statute, which declares that "in Scotland a firm is a legal person, distinct from the partners of whom it is composed." The Mercantile Law Amendment Commission in 1855, after full enquiry, expressed the opinion

that this principle "is a very convenient and useful one," and recommended its introduction into the law of England and Ireland (*b*), a suggestion which has not yet received effect.

The doctrine as recognised in Scotland is not a mere legal fiction, but is productive of many important practical results, the leading differences between the English and Scotch law of partnership being directly traceable to it. It may therefore be useful here to note the leading consequences of the doctrine.

1. The funds of the partnership belong not to the partners as joint owners, but to the firm itself as sole owner.

2. The firm itself is the proper or primary debtor in debts owing by the partnership, and the debt must, in the first place, be constituted against the firm. On the failure of the firm to pay according to its obligation, the partners individually are liable *singuli in solidum* for the debts as obligations of a third party. The estate of a partner can, in bankruptcy, be charged only with the balance not met by firm's estate.

3. In legal proceedings by or against the partnership, if the name of the firm comprises the name of persons only, (*e.g.*, A. & B. or A. B. & Co.), the firm itself may sue or be sued by that name, and no partners need be named or served: but if the name be a descriptive one (*e.g.*, Clyde Shipping Co.), the names of three partners (if there be so many) must be used along with the descriptive name.

4. The firm may stand in the relation of debtor or creditor to any of its partners, and can sue or be sued by any of them.

5. Two firms having one or more members in common may sue each other.

6. A firm may be sequestrated without the individual partners being sequestrated.

7. Creditors of a partner may attach his share or interest in the partnership by arrestment in the hands of the firm, as

(*b*) Mercantile Law Amendment Commission, 2nd Report (1855), p. 18.

a separate person; and it may be assigned, and the right completed by intimation to the firm.

The second of these points is touched by the ninth section of this statute, which reaffirms the joint and several liability of partners of a Scotch concern for the firm's obligations, without, however, referring to the necessity of first constituting the debt against the firm; but, for the reasons stated in the notes on that section, it is thought no change is thereby made on the existing law.

The seventh of these consequences is left in the very unsatisfactory position which it at present holds. The interest of a partner in a partnership concern is a *jus crediti*, a personal or moveable right, in the hands of a third party, the firm. Like any other right or moveable so situated it is attachable by arrestment, to be made effectual by an action of furthcoming; and similarly it is assignable by the partner, and the right is completed by intimation of the assignation to the debtor, the firm. This confers, however, no right on the arresting creditor or assignee to become a partner; nor to dissolve the partnership if, under the contract, there be still a term to run. Further action cannot be taken till dissolution of the firm, when in a winding-up the creditor or assignee would realise his debtor's share or interest in the concern. What may be done in the case of a partnership at will is not clear. The thirty-third section of the act gives a remedy in the corresponding case of a charging order in England, by conferring on the other partners an option of dissolving the partnership. The remedy, it is to be observed, is given in the interest or for the benefit, not of the partner who is indebted, or of his creditors, but of the other partners of the concern. It is to be regretted that some similar power has not been given in Scotland.

Little has been done to assimilate the laws of England and Scotland, even in points where the way was paved by the report of the Mercantile Law Amendment Commission. The effect of the thirty-sixth section, however, though not happily expressed, appears to be to remove a difference between these laws on a comparatively minor point, viz., the notice required to be given by a dormant partner on his retirement. In

Scotland there was no difference, in this respect, between an ostensible and a dormant partner. In England, however, the dormant partner only required to give special notice of his retirement to those persons at the time having relations with the partnership *who were aware of the dormant partner's connection with it*, and to no others either specially or by advertisement. The terms of this section are commented on in the notes.

But the important subject of set-off between the firm's and partners' debts, upon which the Commission made several recommendations, is not touched by the act. This point is referred to under the ninth section, which deals with the joint and several liability of partners according to the law of Scotland.

The forty-sixth section has the effect of preserving the existing state of the law wherever not expressly altered. The question will accordingly arise whether the marriage of a female partner (which is not mentioned in the Act) shall continue, as hitherto, to operate *ipso facto* a dissolution, or whether the Married Women's Property (Scotland) act, 1881, has any effect in modifying the common law. This point is further referred to in the notes.

The law on the subject of the bankruptcy of a firm and individual partners, including the question of ranking of debts arising thereon, is excluded by the forty-seventh section of the act, and left to stand upon the statutes and decisions in the law of bankruptcy.

The annotations on the statute, so far as affecting the law of Scotland, are intended to illustrate the present state of that law, and to point out any alterations introduced by the act. Reference is accordingly made to the institutional writers, and notably to Mr. George Joseph Bell, Professor of Scots Law in the University of Edinburgh (from 1822 to 1843) whose Commentaries have placed the profession and his country under lasting obligations. The leading decisions of the Court of Session and on appeal therefrom of the House of Lords are also cited. The subjects and sources of many of the notes are familiar and accessible enough to most Scottish lawyers; but it is hoped that in this form they will, with the parallel notes and

references to English authorities, prove useful to readers and practitioners both in England and Scotland.

The most recent (the seventh), edition of Professor Bell's Commentaries on the Law of Scotland, edited by Lord McLaren, when at the bar, and published in 1870, has been used. It contains the text as left by the author, with valuable annotations by the editor, and a reference to authorities of later date; and is now the edition most generally in use.

PARTNERSHIP ACT, 1890.

53 & 54 VICT., CHAPTER 39.

An Act to declare and amend the Law of Partnership.
[14*th August*, 1890.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Nature of Partnership.

Definition of partnership.

1.—(1.) Partnership is the relation which subsists between persons carrying on a business in common with a view of profit.

(2.) But the relation between members of any company or association which is—

(*a.*) Registered as a company under the Companies Act, 1862, or any other Act of Parliament for the time being in force and relating to the registration of joint stock companies; or 25 & 26 Vict. c. 89.

(*b.*) Formed or incorporated by or in pursuance of any other Act of Parliament or letters patent, or Royal Charter; or

(*c.*) A company engaged in working mines within and subject to the jurisdiction of the Stannaries:

is not a partnership within the meaning of this Act.

For previous attempts at defining partnership, see "Partnership," pp. 2—4.

SUB-SECTION 1.

Sub-section (1).

When the present Act was introduced into the House of Lords § 1 (1) stood as follows:—

"Partnership is the relation which subsists between persons who have agreed to carry on a business in common with a view of profit."

This definition was inaccurate, for, as pointed out by Parke, J., in *Dickinson* v. *Valpy* (1829) (*a*), persons who have entered into an agree-

(*a*) 10 B. & C. pp. 141—2.

Section 1.

ment that they will at some future time carry on business as partners, can not be considered as partners until the arrival of that time. The definition in its present form avoids this inaccuracy, but it may be a question whether it does not go too far in the opposite direction by making the actual carrying on business a test of partnership. The cases on this subject will be found in "Partnership," pp. 20 *et seq.*

It will be observed also that the definition in its original form stated that the partnership relation rested upon agreement. The present definition does not state this, but it is conceived that the relation can only result from an agreement. Before therefore the relation can result, all the elements of a legal contract between the persons carrying on a business in common with a view of profit must be present, and therefore in every case in which the existence of a partnership is in question, the following points will require attention :—

(1.) The consideration necessary to support the contract ; as to which see "Partnership," p. 63.

(2.) The capacity of the persons in question to enter into a contract of partnership ; see *ib.* pp. 71 *et seq.*

(3.) The evidence by which such a contract may be proved ; see *ib.* pp. 83 *et seq.* (*b*).

(4.) The legality of the contract ; see *ib.* pp. 91 *et seq.*

"*Business.*"—See § 45, *infra.*

"*With a view of profit.*"—These words will distinguish partnerships from other kindred associations, such as clubs, which do not exist with a view of profit (see "Partnership," p. 50). Hitherto it has been considered essential for a partnership to have for its object not only the acquisition, but also the division, in some way or another, of profit (*c*), and consequently mutual insurance societies have not hitherto been treated as partnerships (*d*). Such societies are, however, associations "which have for their object gain" within the meaning of § 4 of the Companies Act, 1862 (*e*). It may therefore be that societies of this nature, which, by reason of the number of the persons carrying on the business (*f*) or otherwise, do not require to be registered under the Companies Act, 1862, will be held to be partnerships under this Act.

Scotch Law.

Scotch Law. Definitions.

Mr. Erskine's definition is,—Society or co-partnery is a consensual contract "by which the several partners agree concerning the communication of loss

(*b*) In addition to the cases there cited as to the application of § 4 of the Statute of Frauds to contracts of partnership, see *Gray* v. *Smith* (1889), 43 Ch. Div. 208.

(*c*) *Pooley* v. *Driver* (1876), 5 Ch. D. p. 472 ; *Mollwo, March & Co.* v. *Court of Wards* (1872), L. R. 4 P. C. p. 436.

(*d*) "Partnership," p. 51, and cases there cited.

(*e*) See *Ex parte Hargrove* (1875), 10 Ch. 542, and other cases collected in "Lindley on the Law of Companies," pp. 114—15.

(*f*) As in *Smith* v. *Anderson* (1880), 15 Ch. Div. 247.

Section 1.

or gain arising from the subject of the contract" (*g*). Professor George Joseph Bell's definition is,—"a mutual contract and voluntary association of two or more persons for the acquisition of gain or profit with a contribution for that end of stipulated shares of goods, money, skill, and industry; the stock of the society being held *pro indiviso* in trust for the creditors" (*h*).

Professor Bell observes that definitions of partnership are to be received with peculiar caution if borrowed from the Civilians "who neglect almost entirely the implied power and unlimited mandate of the partners to bind the rest" (*i*).

SUB-SECTION 2.

Sub-section (2).

Section 4 of the Companies Act, 1862, prohibits the formation of any company, association, or partnership consisting of more than ten persons for the purpose of carrying on the business of banking, or consisting of more than twenty persons for the purpose of carrying on any other business, that has for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof, unless it is registered under that Act, or is formed in pursuance of some other Act of Parliament, or of letters patent, or is a company engaged in working mines within and subject to the jurisdiction of the Stannaries.

For cases which have been decided under this section, see "Lindley on the Law of Companies," pp. 114—115.

By a comparison of this section of the Companies Act with the present Act it will be observed—

(1.) That "business" in this Act may, by reason of the interpretation of that word given in § 45, have a more extensive application than "business" in § 4 of the Companies Act.

(2.) That the present Act speaks of "profit," and the Companies Act of "gain" (*k*).

(3.) That the Companies Act does not expressly exclude from its operation companies formed under royal charter. The Crown at common law possesses the right of incorporating by charter any number of persons who assent to be incorporated, and as the Crown is not bound by the Companies act, 1862 (*l*), it is conceived that that Act cannot render the registration of corporations formed by royal charter, however numerous the members of such corporations may be, compulsory.

As to what companies or associations may be registered under the Companies Act, 1862, see "Lindley on the Law of Companies," pp. 111 *et seq.*

Cost-book companies.

Though companies engaged in working mines within and subject to the jurisdiction of the Stannaries are not partnerships within the meaning of

(*g*) III. 3, 16.
(*h*) Principles, § 351.
(*i*) 2 Bell's Com. 499.
(*k*) See the remarks of Jessel, M.R., in *Ex parte Hargrove* (1875), 10 Ch. 542.
(*l*) See *Oriental Bank Corporation* (1884), 28 Ch. D. 643; *Re Henley & Co.* (1878), 9 Ch. Div. 469.

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this Act, section 23, which regulates the procedure against partnership property for a partner's separate judgment debt, applies to cost-book companies. (See *infra*, § 23 (4).)

Unregistered companies.

The companies referred to in Part VIII. of the Companies Act, 1862 (§§ 199—204), viz., those consisting of more than seven members and unregistered, will fall under this Act while the company is a going concern; but the provisions of the Companies Acts, with the exceptions and additions enacted in these sections, will apply to the winding up thereof. One of these exceptions excludes winding up voluntarily or under supervision of the Court.

Rules for determining existence of partnership.

2. In determining whether a partnership does or does not exist, regard shall be had to the following rules:

(1.) Joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof.

(2.) The sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived.

(3.) The receipt by a person of a share of the profits of a business is *primâ facie* evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business; and in particular—

(*a.*) The receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of a business does not of itself make him a partner in the business or liable as such;

(*b.*) A contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business does not of itself make the servant or agent a partner in the business or liable as such:

(*c.*) A person being the widow or child of a deceased partner, and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner, is not by reason only of such receipt a partner in the business or liable as such:

(*d.*) The advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such. Provided that the contract is in writing, and signed by or on behalf of all the parties thereto:

(*e.*) A person receiving by way of annuity or otherwise a portion of the profits of a business in consideration of the sale by him of the goodwill of the business is not by reason only of such receipt a partner in the business or liable as such.

"Partnership," pp. 10 *et seq.*

The rules contained in this section only state the weight which is to be attached to the facts mentioned, when such facts stand alone. These facts, when taken in connection with the other facts of the case, may be of the greatest importance, but when there are other facts to be considered this section will be found to be of very little assistance. The main rule to be observed in determining the existence of a partnership, a rule which has been recognised ever since the case of *Cox* v. *Hickman* (1860) (*m*), and was expressly stated in the present Act when it was first introduced into the House of Lords, is that regard must be paid to the true contract and intention of the parties as appearing from the whole facts of the case. Although this principle is no longer expressed it is still law (see § 46).

Adam *v.* Newbigging.

If the real effect of the agreement is to create the partnership relation, the parties cannot escape from the consequences of being partners. This is clearly stated by Lord Halsbury in the following passage from his judgment in the case of *Adam* v. *Newbigging* (1888) (*n*). "If a partnership in fact exists, a community of interest in the adventure being carried on in fact, no concealment of name, no verbal equivalent for the ordinary phrases of profit and loss, no indirect expedient for enforcing control over the adventure will prevent the substance and reality of the transaction being adjudged to be a partnership; and I think I should add, as applicable to this case, that the separation of different stipulations of one arrangement into different deeds will not alter the real arrangement, whatever in fact that arrangement is proved to be. And no 'phrasing of it' by dexterous

(*m*) 8 H. L. C. 268. See *Badeley* v. *Consolidated Bank* (1888), 38 Ch. Div. at p. 258, "Partnership," pp. 10 *et seq.*

(*n*) 13 App. Ca. p. 315.

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draftsmen, to quote one of the letters, will avail to avert the legal consequences of the contract." Nevertheless a clause negativing partnership may throw light on other clauses in the agreement, and rebut inferences which might be drawn from them alone. (See "Partnership," p. 11.)

SUB-SECTION 1.

Sub-section (1).

This sub-section has not introduced any alteration in the existing law. For cases illustrating the position of co-owners, see "Partnership," pp. 51 *et seq.* See also *infra*, § 20 (3).

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This is the existing law (*o*). In *Parnell* v. *Walter* (1889) (*o*), after hearing evidence, including that of English counsel, Lord Kinnear held that the proprietors of *The Times* newspaper formed a partnership, and were not merely co-owners. See as to co-lessees, *McVean* v. *McVean* (1864) (*p*), and *Moore* v. *Dempster* (1879) (*q*).

SUB-SECTION 2.

Sub-section (2).

This sub-section appears only to summarise the law which may be deduced from the cases collected or referred to in "Partnership," pp. 17 and 18.

Persons who share gross returns necessarily share profits, if there are any, but they do so only incidentally, because such profits are included in what is divided. (See "Partnership," pp. 8 and 9.)

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This has also been stated as the law of Scotland (*r*). See also *per* Lord Shand in *Eaglesham* v. *Grant* (1875) (*s*).

SUB-SECTION 3.

Sub-section (3).

The first clause of this sub-section is not well expressed, and indeed appears to contain a contradiction in terms, for if the receipt of a share of the profits of a business is *primâ facie* evidence of partnership, it necessarily follows that the receipt of such a share, if that is the only fact in the case, must of itself be sufficient to establish a partnership. The effect of the receipt of a share of profits in determining the existence or non-existence of a partnership was very carefully considered by the Court of Appeal in the recent case of *Badeley* v. *Consolidated Bank* (1888) (*t*), and it is conceived that

(*o*) Stair I. 16, 1; Erskine III. 3, 18; 2 Bell's Com. 544; Bell's Pr. § 351; *Neilson* v. *McDougal* (1682), M. 14,551; *Aitchison* v. *Aitchison* (1877), 4 R. 899; *Parnell* v. *Walter* (1889), 16 R. 917.

(*p*) 2 Mc. 1150.

(*q*) 6 R. 930.

(*r*) Clark on Partnership, 47 and 53.

(*s*) 2 R. 964.

(*t*) 38 Ch. Div. 238.

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this sub-section does not alter the law stated in that case. The meaning of the rule that the sharing of profits is *primâ facie* evidence of partnership is explained in the following passages from the judgments in that case.

Badeley *v.* Consolidated Bank.

"It is said that there are *dicta* of various judges in various cases that the participation in the profits may decide the question, or that it is *primâ facie* evidence of partnership. Undoubtedly, if one found that two persons were participating in the profits made by a business, and knew nothing more. one would say, How is this? If they participate in the profits as being jointly entitled to the profits, that unless explained would lead to the conclusion that the business is the joint business of the two, and this would be partnership. But then when the participation in profits arises from a clause in an agreement entered into between the parties, it is wrong to say that this is *primâ facie* evidence of a partnership, because you must look not only to that stipulation, but to all the other stipulations in the contract, and determine whether on the stipulations of the contract, taken as a whole, you can come to the conclusion that there is a partnership—that there is a joint business carried on on behalf of the two—or whether the transaction is one of loan between debtor and creditor, a loan secured by giving a certain interest in the profits" (*u*).

"I take it, it is quite plain now, ever since *Cox* v. *Hickman* (*x*), that what we have to get at is the real agreement between the parties. It is no longer right to infer either partnership or agency from the mere fact that one person shares the profits of another. It may be, and probably it is true, that if all that is known is that one person carries on a business and shares the profits of that business with another, *primâ facie* those two are partners, or *primâ facie* the person carrying on the business is carrying it on as the agent of the person with whom he shares his profits. That may be true, and I think is true even now; but when you have a great deal more to consider, it appears to me to be a fallacy to say that you are to proceed upon the idea that sharing profits *primâ facie* creates a partnership or an agency, and that *primâ facie* presumption has to be rebutted by something else" (*y*).

For other cases illustrating the first clause of this sub-section, see "Partnership," pp. 12 *et seq.*

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Scotch Law.

Prior to *Cox* v. *Hickman* (1860), the Law of Scotland on this point was summarised by Professor Bell thus:—"If by such evidence" (*i.e.*, parole or written) "either a direct connection as partners shall be established, or participation of profit, it will be sufficient to raise the responsibility as a partner" (*z*).

Cox *v.* Hickman.

(*u*) Per Cotton, L.J., 38 Ch. Div. at p. 250.

(*x*) 8 H. L. C. 268.

(*y*) Per Lindley, L.J., 38 Ch. Div. at p. 258. See also Bowen, L.J., p. 262, ib; and *Mollwo, March & Co.* v. *Court of Wards* (1872), 4 P. C. 433.

(*z*) 2 Bell's Com. 511; Bell's Pr. § 363. See also *McKinlay* v. *Gillon* (1830), 9 S. 90; affd. H. L. 5 W. & S. 468.

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Commenting on the cases of *Cox* v. *Hickman* (1860), *Bullen* v. *Sharpe* (1865), and *Mollwo, March & Co.* (1872), Lord Shand, in 1875, states his concurrence "in the view expressed by Mr. Lindley, that the judgments in those two cases merely carried out to their legitimate results the principles which were announced, and which received effect in the decision of *Cox* v. *Hickman*; and I think they bear out the statement made by Mr. Lindley . . . . that they 'establish the doctrine that no person who does not hold himself out as a partner is liable to third persons for the acts of persons whose profits he shares, unless he and they are really partners *inter se*.' . . . . Where, however, the question is whether a person who receives with others a share of the profits of a business, of which they are unquestionably partners, is also a partner, I think it is the result of the decisions above referred to that (in the absence of acts showing that with his knowledge or authority he was held out as a partner), the receipt of profits will not infer responsibility as a partner, unless the parties, having regard to the subsistence of their arrangements, are really partners *inter se*; and referring in particular to the opinion of Baron Bramwell, in the case of *Bullen* v. *Sharpe*, and to the judgment in the case of *Mollwo, March & Co.*, I think there is no more reason for inferring agency, with resulting liability for the debts of the business, from an agreement to share profits, than for inferring partnership as between the parties receiving profits." *Eaglesham* v. *Grant* (1875) (*a*).

SUB-SECTION 3. (*a*).

Sub-section (3) (*a*).

Sub-section (3) (*a*) substantially expresses the decision in *Cox* v. *Hickman* (1860) (*b*); for observations on that case and other cases following it, see "Partnership," pp. 30 *et seq.*

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This sub-section is illustrated in *Eaglesham* v. *Grant* (*supra*), and *Stott* v. *Fender and Crombie* (1878) (*c*).

SUB-SECTION 3 (*b*), (*c*), (*d*), and (*e*).

Sub-section (3) (*b*), (*c*), (*d*), and (*e*).

Sub-sections (3) (*b*), (*c*), (*d*), and (*e*) are re-enactments, with some slight modifications, of §§ 2, 3, 1, and 4 of Bovill's Act (28 & 29 Vict. c. 86), which is repealed by the present act (*d*).

There was a doubt whether § 2 of Bovill's Act (*e*) did not deprive a servant remunerated by a share of the profits of the right to an account to which he would otherwise have been entitled (*f*). This doubt has been

(*a*) 2 R. 964—5.
(*b*) 8 H. L. C. 268.
(*c*) 5 R. 1104.
(*d*) See for decisions upon this Act, "Partnership," pp. 36 *et seq.*
(*e*) See the Act printed in Partnership, p. 35, and note (*s*).
(*f*) *Harrington* v. *Churchward*, 6

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removed by the omission in sub-section (3) (*b*) of the words "nor give him the rights of a partner," which occurred in Bovill's Act, and occasioned the doubt.

Sub-section (3) (*b*).

Section 3 of Bovill's Act, for which sub-section (3) (*c*) of this Act is substituted, applied only to the widow or child of the deceased partner of a trader, while the present section applies to the widow or child of a partner generally. Similar modifications have been made in the other sub-sections.

Sub-section (3) (*c*).

Section 1 of Bovill's Act, for which sub-section (3) (*d*) of this Act is substituted, required the contract to be in writing, but did not expressly require that it should be signed. In *Pooley* v. *Driver* (1876) (*g*), Jessel, M.R., decided that an unsigned contract was not within the first section of Bovill's act, but was nevertheless admissible as evidence to show the terms on which the advance was made, and he relied upon these terms as evidence of the partnership, which in that case he held to exist. If it is law that a contract not within this sub-section is admissible as evidence to show the terms on which a loan is made, and there appears to be nothing in this act to exclude such evidence, it is difficult to see the utility of the proviso to the present sub-section. Whether a contract is or is not within the sub-section, when its terms are once proved its real effect must be considered, and if on the construction of the contract the relation between the parties is that of debtor and creditor, there is nothing in this act or the general law to change this relation into the different relation of partners. If this be so, the only advantage of a signed contract appears to be that such a contract is more easily proved than a verbal or unsigned agreement. No doubt the Court would very closely examine any alleged advance by way of loan to a person engaged in business upon the terms that the lender should receive a share of profits arising from the business, unless the agreement was in writing and signed by the parties. On the other hand, if the lender is able to overcome this difficulty, as, for instance, by producing a memorandum of all the terms of the agreement signed by all parties except himself, it may be that he will be in a better position than if the contract had been duly signed, for it appears doubtful whether § 3 of this Act would apply to the case of a loan upon a contract not signed by all the parties thereto (see that section and notes thereto). If § 3 does not apply, there is no rule of law that would prevent the lender from proving his loan and receiving payment thereof in competition with the other creditors of the borrower.

Sub section (3) (*d*).

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Even prior to Bovill's Act the law was stated by Professor Bell thus:— "Such responsibility," (*i.e.*, as a partner) "however, is not incurred by receiving a mere payment, allowance, or wages proportioned to the profits. So wages may be paid to clerks, commission to a broker, or hire to a

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Jur. N. S. 576; *Rishton* v. *Grissell* (1864), 4 De G. J. & Sm. 332.
(1868), 5 Eq. 326; *Turney* v. *Bailey* (*g*) 5 Ch. D. at pp. 468—469.

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lighterman for working a lighter, proportionally to the gains to be made, without involving the responsibility of a partner" (*h*).

Postponement of rights of person lending or selling in consideration of share of profits in case of insolvency.

3. In the event of any person to whom money has been advanced by way of loan upon such a contract as is mentioned in the last foregoing section, or of any buyer of a goodwill in consideration of a share of the profits of the business, being adjudged a bankrupt, entering into an arrangement to pay his creditors less than twenty shillings in the pound, or dying in insolvent circumstances, the lender of the loan shall not be entitled to recover anything in respect of his loan, and the seller of the goodwill shall not be entitled to recover anything in respect of the share of profits contracted for, until the claims of the other creditors of the borrower or buyer for valuable consideration in money or money's worth have been satisfied.

"Partnership," pp. 36 *et seq.*

This section is substantially a re-enactment of § 5 of Bovill's Act, which was probably the only section of that act that introduced a change into the existing law (see Sir Frederick Pollock's "Digest of the Law of Partnership," 4th edit. p. 12).

"*Upon such a contract as is mentioned in the last foregoing section.*"—These words refer to § 2 (3) (*d*), and introduce some difficulty; they may refer to the substance of the contract or to the substance and form of the contract. If they refer to the substance only, the proviso to that sub-section appears to be without meaning; if they refer to the substance and the form, the position of a person who lends money to another engaged in business on the terms that the lender shall receive a rate of interest varying with the profits or shall receive a share of the profits, will, as pointed out in the notes to that sub-section, depend upon whether the contract upon which the loan so made is or is not in writing and signed by all the parties thereto. Of the two constructions the former appears to be the less objectionable.

It has been decided that § 5 of Bovill's Act did not deprive the lender of his right to retain any security he might take for his money (*i*), and the same construction would doubtless be put upon the present section.

Meaning of firm.

4.—(1.) Persons who have entered into partnership with one another are for the purposes of this Act called collectively a firm, and the name under which their business is carried on is called the firm-name.

(*h*) Bell's Principles, § 364. Div. 789.
(*i*) *Ex parte Sheil* (1877), 4 Ch.

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(2.) In Scotland a firm is a legal person distinct from the partners of whom it is composed, but an individual partner may be charged on a decree or diligence directed against the firm, and on payment of the debts is entitled to relief *pro ratâ* from the firm and its other members.

SUB-SECTION 1.

"Partnership," pp. 110 *et seq.*

Sub-section (1).

This sub-section introduces no change in the existing law.

Speaking generally, the English law does not recognise a firm as distinct from the members composing it, and in this respect the legal differs from the mercantile notion of a firm (see "Partnership," pp. 110 *et seq.*).

The English law does, however, recognise the firm so far as to allow actions and proceedings to be brought by or against the partners in the firm-name; see

Rules of Supreme Court, Order xvi. r. 4.

Bankruptcy act, 1883, § 115.

Bankruptcy rules, 1886, r. 259.

"Partnership," pp. 115, 264 *et seq.*, and 456 *et seq.*

In addition to the cases cited in "Partnership," see

Russell v. Cambefort.

Russell v. *Cambefort* (1889) (*k*), which decides that a writ cannot be served under Order ix. r. 6, upon the manager at the principal place of business within the jurisdiction of a firm, the members of which are foreigners resident out of the jurisdiction. And compare *Shepherd* v. *Hirsch*, *Pritchard & Co.* (1890) (*l*), which decides that such service is good if one of the partners is a British subject resident in England.

Davies & Co. v. André & Co.

Davies & Co. v. *André & Co.* (1890) (*m*), decides that a person served with a writ issued against the firm in the firm-name can not enter a conditional appearance, under protest; his proper course under such circumstances is to appear, if he is a partner, or not to appear, if he is not a partner.

The firm-name in point of law is a conventional name applicable only to the persons who on each particular occasion when the name is used are members of the firm (see "Partnership," pp. 112 *et seq*).

SUB-SECTION 2.

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Scotch Law.

Sub-section (2).

Firm a separate *persona*.

This has always been a distinctive feature of the Scotch law of partnership. Professor Bell states it thus:—"The company forms a separate person, competent to maintain its relations with third parties by its separate name or firm, independently of the partners; capable also of holding a lease, but not of holding feudally as a vassal" (*n*). The leading consequences of this principle are enumerated in the Introduction supra, p. 8.

(*k*) 23 Q. B. Div. 526.

(*l*) 45 Ch. D. 231.

(*m*) 24 Q.B.Div.598. See also *Alden* v. *Beckley & Co.* (1890), 25 Q. B. D. 543.

(*n*) Pr. § 357. See also 2 Bell's Com. 507.

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Professor Bell also points out that though one person cannot form a firm or partnership, the same persons may form several distinct firms provided there be a real and perceptible distinction of trade and establishment between them (*o*).

Action and diligence.

Action or diligence by or against a firm having a personal name (such as A. & B. or A. B. & Co., or the like), may be taken in that name, without joining the name of any individual partner, *Forsyth* v. *Hare & Co.* (1834) (*p*). When, on the other hand, the firm's name is descriptive (such as the Clyde Shipping Co.), the recognised mode is to join with the firm the names of three partners, if there be so many: *London, &c., Shipping Co.* v. *McCorkle* (1841) (*q*). Action or diligence by or against the officials of such a firm on its behalf, even with the addition of the descriptive name, is incompetent: *McMillan* v. *McCulloch* (1842) (*r*). Each partner has, in virtue of his legal *prepositura* or mandate in the firm's affairs, a right to sue debtors of the firm in the firm's name, and if necessary to use the names of other partners, *Antermony Co.* v. *Wingate* (1866) (*s*); and that notwithstanding disclaimer by another partner, *Kinnes* v. *Adam* (1882) (*t*); but not in matters beyond the scope of the firm's business, *Tasker* v. *Shaws Water Co.* (1866) (*u*).

Enforceable against partners.

Moreover, decree or judgment (including a registered bond or bill) against a partnership in its firm-name is, in legal signification, a decree against every individual who is *de facto* a partner; and all competent diligence, both on the dependence of the action and in execution of the decree, is enforceable against each partner. Further, without any judicial procedure to establish the fact, it lies with the messenger-at-arms to discover who the individuals comprising the firm are: *Ewing* v. *McClelland* (1860) (*x*). If their character as partners be denied, they will be entitled to suspension of the diligence, with or without caution (security), and may also be entitled to damages (*y*). The Law Amendment Commissioners in 1855 expressed the opinion that in this respect the law of Scotland was unjust, and might lead to great oppression, and recommended that separate judicial procedure should be required where the names of partners are not included in the action or judgment. This sub-section has not given effect to that recommendation, but leaves the common law as it was (*z*).

It is incompetent to sue individual partners of a subsisting firm without calling the firm and constituting the debt against it: *Muir* v. *Collett* (1862) (*a*). But if the firm be a foreign one, whose domicile does not recognise the separate *persona* of a firm, it is enough to call all the partners who are within the jurisdiction of the Scotch Court;

(*o*) 2 Bell's Com. 515.
(*p*) 13 S. 50, affd. H. L. 3 Paton, 428.
(*q*) 3 D. 1045.
(*r*) 4 D. 492.
(*s*) 4 Mc. 1017.
(*t*) 9 R. 698.
(*u*) 5 Mc. 256. See Mackay's Court of Session Practice, I. 328.
(*x*) 22 D. 1347, and prior cases.
(*y*) Bell's Pr. § 371.
(*z*) Second Report, p. 18. See § 46, *infra*.
(*a*) 24 D. 1119. See § 9, *infra*.

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otherwise the debt must first be constituted against the firm, *Muir, supra;* but see *contra* in England, *Bullock* v. *Caird* (1875) (*b*), where action in England was sustained against a partner of a Scotch firm without judgment being first obtained against the firm. In *Paton* v. *Neill, Edgar & Co.* (1873) (*c*), after jurisdiction had been founded in Scotland by arrestment, action was sustained there against an English firm in its firm-name, without calling individual partners.

After dissolution.

After a firm is dissolved it is not necessary to call the firm, but only every individual partner within the jurisdiction, *Muir, supra; McNaught* v. *Milligan* (1885) (*d*), unless the remaining partner has taken over the firm debts, in which case it is enough to call him: *Price* v. *Wise* (1862) (*e*). As the firm, however, still subsists for winding up, the debts due to it may, as formerly, be sued for in the firm's name, without the name of the partners; and an action at the instance of a sole surviving partner has been sustained as in substance at the firm's instance: *Nicoll* v. *Reid* (1877) (*f*).

Criminal or penal actions.

A firm can neither prosecute nor be prosecuted *socio nomine* in a criminal or penal action. The proceedings must be by or against the individual partners (*g*).

Extent of relief.

The extent to which a partner paying a firm debt will be entitled to relief from the firm and the other partners will depend on their contract, and the state of accounts between them.

(*b*) L. R. 10 Q. B. 276.
(*c*) 10 S. L. R. 461.
(*d*) 13 R. 366.
(*e*) 24 D. 491.
(*f*) 5 R. 137.
(*g*) Macdonald's Criminal Law, p. 275. *Miles* (1830), 9 S. 18. But see as to bodies corporate, Interpretation Act, 1889, § 2.

Relations of Partners to persons dealing with them.

Power of partner to bind the firm.

5. Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner.

"Partnership," pp. 124 *et seq.*

This section is in accordance with the existing law. In any case in which the implied authority of one partner to bind the firm is in question, the nature of the business of the firm and the practice of those who carry on similar businesses must be ascertained, and if it is usual amongst such persons for one partner to do the act in question, the firm will be bound; if it is not usual, the firm will not be bound, however urgent the circumstances under which the partner acted may have been (*d*). Hence it is obvious that a decision that a particular act, when done by a partner in a firm of bankers, binds the firm, can afford no answer to the question whether a firm of merchants would be bound by a similar act if done by a member of such a firm (*e*).

For particular instances of the power of one partner to bind his firm, see "Partnership," pp. 128 *et seq.* In addition to the cases there cited, see

Simpson's Claim.

Simpson's Claim (1887) (*f*), where it was held that a manager abroad of a company carrying on the business of importers and dealers in tinned provisions has no implied authority to bind the company by a promissory note given to indemnify a person who had guaranteed the fulfilment of a contract entered into by the manager for securing a supply of meat to the company, although the person with whom the contract was made required such a guaranty, and was almost the only person in the place with whom the contract could have been made.

Singleton *v.* Knight.

Singleton v. *Knight* (1888) (*g*), in which it was held by the Privy Council that a partner has no implied authority to enter into partnership with other

(*d*) *Hawtayne* v. *Bourne* (1841), 7 M. & W. 595; *Simpson's Claim* (1887), 36 Ch. D. 532; and see *Ex parte Chippendale* (1853), 4 De G. M. & G. 19; compare *Montaignac* v. *Shitta* (1890), 15 App. Ca. 357.

(*e*) See remarks in *Niemann* v. *Niemann* (1889), 43 Ch. Div. 198, on *Weikersheim's case* (1873), 8 Ch. 831.

(*f*) 36 Ch. D. 532.

(*g*) 13 App. Ca. 788. See also *British Nation. Life Assurance Association* (1878), 8 Ch. Div. p. 704.

persons in another business so as to make his partners partners in such other business.

Niemann v. Niemann.

Niemann v. *Niemann* (1889) (*h*), where the Court of Appeal held that a partner in a firm of merchants has no implied authority to accept on behalf of his firm fully paid-up shares in a company, in satisfaction of a debt due to the firm.

The implied agency of a partner to act on behalf of his co-partners commences with the commencement of the partnership (see §§ 1 and 17 (1), and "Partnership," pp. 201 *et seq.*), and, subject to §§ 36 and 38, terminates with its termination.

"*Either knows that he has no authority.*"—See infra, § 8.

"*Or does not know or believe him to be a partner.*"—These words adopt the view of the law expressed by Cockburn, C.J., in *Nicholson* v. *Ricketts* (1860) (*i*), and by Cleasby, B., in *Holme* v. *Hammond* (1872) (*k*).

It is not necessary for the person with whom the partner is dealing to know who the co-partners of such partner are, it is sufficient if he knows or believes him to be a partner with some other person or persons. These words do not, therefore, relieve a dormant partner from any liability to which he may be subject under the earlier part of this section, but prevent the co-partners of a dormant partner from being bound by his acts if, without authority, he deals with a person who does not know or believe him to be in partnership with anyone.

Factors' Act.

It is conceived that the Factors' Act, 1889, neither extends nor abridges the power of a partner to sell or pledge the goods of a firm (*l*).

The equitable doctrine under which, where money, borrowed by one partner in the name of the firm but without the authority of his co-partners, has been applied in paying off debts of the firm or for any other legitimate purpose of the firm, the lender is entitled to repayment by the firm of the amount which he can show to have been so applied (*m*), is not affected by this Act. See § 46.

Scotch Law.

Scotch Law.

Implied mandate.

This is in accordance with existing law (*n*). The implied mandate covers power to sue debtors in the firm's name: *Antermony Co.* (1866) (*o*), and that notwithstanding disclaimer by another partner: *Kinnes* v. *Adam* (1882) (*p*). In *Smith* v. *North British Ry. Co.* (1850) (*q*), an action based on the averment that the partner's want of authority was known to the person dealt with, was sustained as relevant. But the implied mandate does not extend to extraordinary acts out of the usual course of business, *e.g.*, entering into an arbitration: *Lumsden* v. *Gordon* (1728) (*r*), nor to

(*h*) 43 Ch. Div. 198.
(*i*) 2 E. & E. 524.
(*k*) L. R. 7 Ex. 233.
(*l*) 52 & 53 Vict. c. 45, and for Scotland, 53 & 54 Vict. c. 40. And see "Partnership," p. 140.
(*m*) See "Partnership," pp. 189 *et seq.*, and "The Law of Companies," pp. 235 *et seq.* and cases there cited.
(*n*) 2 Bell's Com. 503—507.
(*o*) 4 Mc. 1017.
(*p*) 9 R. 698.
(*q*) 12 D. 795.
(*r*) M. 14, 567.

Section 6.

what is prohibited by statute, as granting orders to workmen upon a store-keeper in contravention of the Truck Act: *Finlayson* v. *Braidbar Co.* (1864) (*s*).

Partners bound by acts on behalf of firm.

6. An act or instrument relating to the business of the firm and done or executed in the firm-name, or in any other manner showing an intention to bind the firm, by any person thereto authorised, whether a partner or not, is binding on the firm and all the partners.

Provided that this section shall not affect any general rule of law relating to the execution of deeds or negotiable instruments.

"Partnership," pp. 176 *et seq.*

This section deals with the liability of a firm for acts done on its behalf by persons who have authority to do the acts, and who do the acts with the intention of binding the firm, and is a statement of a general rule of the law of principal and agent.

"*In any other manner showing an intention to bind the firm.*"—For cases illustrating these words see "Partnership," pp. 176 *et seq.*

"*By any person.*"—Person, by § 19 of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), includes any body of persons corporate or unincorporate.

"*Thereto authorised.*"—The authority may be express or implied, and may be conferred upon the agent previously to his acting or subsequently by ratification, if such ratification does not prejudice third parties (*t*). For an extreme instance of the application of the maxim *Omnis ratihabitio retrotrahitur et mandato priori aequiparatur*, see *Bolton Partners* v. *Lambert* (1889) (*u*), and *Portuguese Consolidated Copper Mines, Ld., Ex parte Badman* (1890) (*x*).

"*General rule of law relating to the execution of deeds.*"—By the general rule of English law if a deed is executed by an agent in his own name, he and he only can sue or be sued thereon, although the deed may disclose the fact that he is acting for another (*y*).

"*Or negotiable instruments.*"—As to bills of exchange and promissory notes, see Bills of Exchange Act, 1882, §§ 23 and 89, and "Partnership," pp. 180 *et seq.* By reason of § 23 of the Bills of Exchange Act, 1882, it would seem that a firm would not now be liable on a bill drawn on the firm and accepted by one partner in his own name, unless his name was the name of the firm, and the cases of *Mason* v. *Rumsey* (1808) (*z*) and *Jenkins*

(*s*) 2 Mc. 1297.

(*t*) See per Fry, L.J., in *London and Blackwall Railway Company* v. *Cross* (1886), 31 Ch. Div. at p. 364.

(*u*) 41 Ch. Div. 295.

(*x*) 45 Ch. Div. 16.

(*y*) *Appleton* v. *Binks* (1804), 5 East, 148; *Hancock* v. *Hodgson* (1827), 4 Bing. 269; *Hall* v. *Bainbridge* (1840), 1 Man. & Gr. 42, and *Pickering's case* (1871), 6 Ch. 525. See also "Partnership," pp. 137, 177.

(*z*) 1 Camp. 384.

v. *Morris* (1847) (*a*) cited in "Partnership," p. 186, note (*x*), cannot be relied upon. Section 7.

Scotch Law.

This is the existing law. See *Blair Iron Co.* v. *Allison* (1855) (*b*), where a promissory note was signed by one of the five partners of a trading firm using the firm-name and adding his own. This was held sufficient; and it was stated by Lord Cranworth that "any form of signature whereby he indicated that he signed as the acting partner of the firm was sufficient to bind them." A letter written and signed by one of the partners of a firm in the firm-name is holograph of the firm and privileged as such: *Nisbet* v. *Neil* (1869) (*c*). In general, a partner may bind his co-partners in any form in which he can bind himself in transactions in the ordinary course of business. Scotch Law. Instruments.

7. Where one partner pledges the credit of the firm for a purpose apparently not connected with the firm's ordinary course of business, the firm is not bound, unless he is in fact specially authorised by the other partners; but this section does not affect any personal liability incurred by an individual partner. Partner using credit of firm for private purposes.

"Partnership," pp. 172 *et seq.*

This section applies whether the partner who pledges the credit of the firm has or has not authority to pledge the credit of the firm for partnership purposes. The law is stated in Smith's Mercantile Law (*d*) as follows: "The unexplained fact that a partnership security has been received from one of the parties in discharge of a separate claim against himself, is a badge of fraud, or of such palpable negligence as amounts to fraud, which it is incumbent on the party who so took the security to remove, by shewing either that the partner from whom he received it acted under the authority of the rest, or at least that he himself had reason to believe so." This statement was adopted by the Court of Common Pleas in *Leverson* v. *Lane* (1862) (*e*). But Cockburn, C.J., in *Kendal* v. *Wood* (1871) (*f*), though otherwise adopting it, expressed a strong opinion that a reasonable cause to believe in the existence of the authority was not sufficient to enable a party who so took the security to hold the firm liable, and this opinion has been adopted by the present section.

Nevertheless, if any other partner has so conducted himself as to give the person taking such a security reasonable ground for believing that the partner giving the security had authority, such other partner may be liable

(*a*) 16 M. & W. 879.
(*b*) 1 Paterson's Scotch Appeals, 609.
(*c*) 7 Mc. 1097.
(*d*) 10th ed. p. 41.
(*e*) 13 C. B. (N. S.) 278.
(*f*) L. R. 6 Ex. p. 248.

Sections 7—8.

on the principle of estoppel (*g*), and this liability is preserved by the concluding words of the section.

For other cases illustrating this rule, see "Partnership," pp. 171 *et seq.*

It is conceived that this section does not alter the law as to *bonâ fide* holders of negotiable instruments for value without notice (*h*).

Scotch Law.

SCOTCH LAW. Firm's credit pledged for private debts.

This is the existing law (*i*). When the transaction, by its circumstances, or in its own nature, is such as to carry evidence of the misapplication of the firm-name to what is an individual concern only, the firm is not liable; unless there be previous consent or subsequent approval. This is illustrated by cases where a firm's bill is taken in payment of a partner's private debt. In *Miller* v. *Douglas* (1811) (*k*), an acceptance of a firm was given in security of a private debt of a partner, with which the firm had no concern, as the pursuer who took the acceptance must necessarily have known, and no communication was made to the firm or its co-partners. The firm was accordingly held not liable. See also decisions noted below (*l*), none of which were cases with *bonâ fide* holders of negotiable instruments.

Effect of notice that firm will not be bound by acts of partner.

8. If it has been agreed between the partners that any restriction shall be placed on the power of any one or more of them to bind the firm, no act done in contravention of the agreement is binding on the firm with respect to persons having notice of the agreement.

"Partnership," pp. 174 *et seq.*

This section adopts the dicta of Lord Ellenborough in *Galway* v. *Mathew* (1808) (*m*) and *Alderson* v. *Pope* (1809) (*n*), and is probably an extension of the law. As pointed out in "Partnership" (pp. 174—176), notice of an agreement between the members of a firm that one of them shall not do certain things is by no means necessarily equivalent to notice that the firm will not be liable for them if he does; and from the analogy of such cases as *Brown* v. *Leonard* (1820) (*o*), and of the undoubted proposition that if partners agree not to be liable beyond a certain amount, and a stranger has notice of that agreement, the notice avails nothing against him (*p*), it

(*g*) See per Blackburn, Montague Smith, and Lush, JJ., in *Kendal* v. *Wood* (1871), L. R. 6 Ex. pp. 251, 253, 254.

(*h*) See Bills of Exchange Act, 1882.

(*i*) 2 Bell's Com. 504.

(*k*) 22 Jan. 1811, F. C.

(*l*) *Matheson* v. *Fraser* (1820), H. 758; *Johnston* v. *Phillips* (1822), 1 Sh. App. 244; *Blair* v. *Bryson* (1834), 13 S. 901.

(*m*) 10 East, 264.

(*n*) 1 Camp. 404.

(*o*) 2 Chitty, 120.

(*p*) *Greenwood's case* (1854), 3 De G. M. & G. p. 459.

would appear more consonant with general principles for a firm to be bound by the acts of a partner exceeding a restricted authority, unless the person with whom he dealt had notice that the firm would not be liable for such acts.

It may be a question whether this section will prevent an indorsee of a bill of exchange accepted in the partnership name by a partner who by agreement between the members of the firm has no authority to accept bills on behalf of the firm availing himself of the ignorance of his indorser if he himself has notice of the agreement (*q*).

Notice.—Generally as to what will amount to notice, see "Watson's Compendium of Equity" (ed. 2), Vol. II., pp. 1149 *et seq.*, and the cases there collected.

Scotch Law.

This is the existing law (*r*). SCOTCH LAW.

Liability of partners.

9. Every partner in a firm is liable jointly with the other partners, and in Scotland severally also, for all debts and obligations of the firm incurred while he is a partner; and after his death his estate is also severally liable in a due course of administration for such debts and obligations, so far as they remain unsatisfied, but subject in England or Ireland to the prior payment of his separate debts.

"Partnership," pp. 192 *et seq.*

The first part of this section, so far as it deals with England and Ireland, states the law in accordance with the decision of *Kendall* v. *Hamilton* (1879) (*s*).

In the event of the death of a partner, a creditor of the firm has concurrent remedies against the surviving partners and the estate of the deceased partner, and it is immaterial which remedy he pursues first, but it is necessary that the surviving partners should be present at the taking of the accounts of the deceased partner (*t*).

"*Debts and obligations of the firm.*"—The obligations here mentioned are obligations of a contractual nature, the liability for obligations arising *ex delicto* is joint and several (see the next three sections). For the difficulty of distinguishing in all cases between these two classes of obligations. See "Partnership," pp. 198 and 199.

Although the liability for the debts of a firm is as mentioned in this section, the partners may by special contract with a creditor incur joint

(*q*) *Rooth* v. *Quin* (1819), 7 Price 193. Bills of Exchange act, 1882, § 29 (3).

(*r*) 2 Bell's Com. 504.

(*s*) 4 App. Ca. 504, and see cases collected in "Partnership," pp. 192 *et seq.*

(*t*) *Re Hodgson, Beckett* v. *Ramsdale* (1885), 31 Ch. Div. 177, and see "Partnership," pp. 597 *et seq.*

Section 9.

and several, or merely joint liability, and in the latter case the estate of a deceased partner will not be liable (for instances, see "Partnership," pp. 196 *et seq.*).

Subject in England and Ireland to the prior payment of his separate debts.—This is in accordance with the existing law. See "Partnership," pp. 598 *et seq.*; Seton, p. 1210; *re Hodgson* (1885) (*u*); and *re Barnard* (1886) (*x*).

Scotch Law.

Scotch Law. Liability of partners.

The present law is thus stated by Professor Bell:—"To third parties each partner is responsible for the whole debts of the concern. In legal language they are liable *singuli in solidum*, and more as guarantors than as principals. They are not entitled . . . to the benefit of discussion. The non-payment on the part of the company at once raises their responsibility. Like other mercantile guarantors, they are conditional debtors if the debt is not paid at the day" (*y*). "It is a consequence of this separate existence of the company as a person that an action cannot directly and in the first instance be maintained against a partner for the debt of the company. The demand must be made first against the company, or the company must have failed to pay, or have dishonoured their bill, before the partner can be called on" (*z*).

Whether debt must be first constituted against firm.

The question occurs whether by force of this section the joint and several liability of partners in Scottish partnerships will now arise immediately, so that an action may be maintained directly and in the first instance against a partner for a firm debt, without, as at present, requiring it to be constituted against the firm? In favour of an affirmative answer are the scope of this act, which is imperial, and designed to declare and amend the law applicable to the three kingdoms; the precise terms of the section; and the fact that, though Scotland is mentioned in it, no qualification of the liability in this particular is introduced, and none exists in England. On the other hand the Scots law doctrine of the legal *persona* of a firm is recognised and continued in this act, § 4 (2), and the present common law rule is, as Professor Bell points out, a consequence of it. Further, by § 46 of this act, the rules of the common law are continued in force, "except so far as they are inconsistent with the express provisions of this act." On the whole, the latter view appears to be the better opinion. The liability affirmed in the section is not denied by the common law rule referred to; but a qualification merely is appended, which is based on a principle elsewhere sanctioned by the Act.

Deceased partner's estate.

The estate of a deceased partner is similarly liable, in a due course of administration, for obligations incurred prior to death (*a*), even though assets and liabilities were transferred and retirement published: *Milliken* v. *Love* (1803) (*b*); *Campbell* v. *McLintock* (1803) (*c*). A partner's separate

(*u*) 31 Ch. Div. 177.
(*x*) 32 Ch. Div. 447.
(*y*) 2 Bell's Com. 507.
(*z*) 2 Bell's Com. 508.
(*a*) 2 Bell's Com. 528; *Cheap* v. *Aiton* (1772), 2 Paton's App. 283.
(*b*) H. 754.
(*c*) H. 755.

creditors have no priority on his estate over the firm creditors. But the firm creditors have a preference on the firm's estate, and rank on the estates of the individual partners only for what is not paid by the firm's estate (*d*).

Compensation or set-off.

As a natural consequence of the doctrine of the separate *persona* of the firm, compensation or set-off takes place, as in the case of individuals, between debts due to and by firms, or to and by an individual and a firm; and also between debts due to a firm by one of its partners, and by the firm to that partner.

Further, as a consequence of that doctrine, and of the principle of joint and several liability of partners for the debts of the firm, compensation or set-off holds in Scotland, though not in England, in the following cases:

(1.) A partner when sued for a firm debt, as he is liable for it *in solidum*, may set off against the claim a debt owing to him by the pursuer: *Bogle* v. *Ballantyne* (1793) (*e*).

(2.) A firm, when sued for a firm debt, may, with the concurrence of a partner who has a counterclaim against the pursuer, set-off that counterclaim against the debt sued for: *Thomson* v. *Stevenson* (1855) (*f*).

(3.) A partner when sued for a private debt may, with the concurrence of the other partners, set-off against that debt a counterclaim of the firm against the pursuer (*g*).

The Law Amendment Commissioners recommended the assimilation of English to Scotch law in the first and second cases; and of Scotch to English law in the third case (*h*), but the recommendations have not been carried out. See further on this subject the authorities cited below (*i*).

Liability of the firm for wrongs.

10. Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act.

"Partnership," pp. 147 *et seq.* and 162 *et seq.*

This section states the application to partners of a general rule of the law of principal and agent, and probably introduces no change in the existing law, though it removes the doubt (*k*) as to whether a firm is or is not

(*d*) 2 Bell's Com. 501, 549; Bell's Prin. § 371.

(*e*) M. 2, 581.

(*f*) 17 D. 739.

(*g*) Mercantile Law Am. Com. 2nd Report, pp. 19 and 142.

(*h*) 2nd Report, p. 19.

(*i*) 2 Bell's Com. 553 *et seq.*; Clark on Partnership, pp. 416 *et seq.*; *Mitchell* v. *Canal Co.* (1869), 7 Mc. 480.

(*k*) See "Partnership," p. 163, and in addition to the cases there cited, *Derry* v. *Peek* (1889), 14 App. Ca. 337, reversing 37 Ch. Div. 541; *Glasier* v. *Rolls* (1889), 42 Ch. Div. 436.

Section 10.

liable in an action of damages for the fraud of one of its members, if committed by him in the ordinary course of the business of the firm, by making the firm liable in every case in which the partner himself is liable. A difficult question of liability in an action for damages may still arise if one partner in the ordinary course of the business of the firm makes a statement, which he *bonâ fide* believes to be true, but which his co-partners know to be false (see Pollock on Torts, 1st ed., p. 256).

The section only deals with the liability of a firm for the wrongful acts or omissions of a partner and leaves its liability for the wrongful acts or omissions of any other agent to be determined by the general law. It is, however, the better opinion that a firm is liable in an action of damages for the fraud of any agent, whether a partner or not, acting within the limits of his authority.

In spite of the general words used in this section (*l*), it is conceived that a firm will not be liable for a false and fraudulent representation concerning the character, credit or solvency of any person unless the representation is in writing signed by all the partners (*m*).

The liability of partners under this section is joint and several. See § 12.

As to representations made by any partner being evidence against the firm, see § 15.

Scotch Law.

Scotch Law. Firm liable for wrongs.

This is the existing law. "The company is liable even for the fraudulent acts of a partner acting in the line of the partnership" (*n*). The principle is that a master is liable for every such wrong of his servant or agent (a partner being the agent of the firm) as is committed in the course of the service or agency, and for the master's or principal's benefit though no express command or privity be proved; and there is no distinction between fraud and any other wrong: *Mackay* v. *Commercial Bank of New Brunswick* (1874) (*o*). In *Scottish Pacific, &c., Co.* v. *Falkner, Bell & Co.* (1888) (*p*), a partner having, with the knowledge of his firm, occupied a fiduciary position towards a public company in its purchase of a mine, his firm was bound to repay a commission got in the purchase. A firm may also be sued for damages for slander and wrongous use of diligence: *Gordon* v. *British and Foreign Metaline Co.* (1886) (*q*); *Wright* v. *Outram & Co.* (1890) (*r*); and prior cases.

(*l*) Maxwell on Interpretation of Statutes, ed. 2, pp. 186 *et seq.*; *Garnett* v. *Bradley* (1878), 3 App. Ca. 944; *Hawkins* v. *Gathercole* (1855), 6 De G. M. & G. 1.

(*m*) 9 Geo. IV. c. 14, § 6; *Swift* v. *Jewsbury* (1874), L. R. 9 Q. B. 301; *Williams* v. *Mason*, 28 L. T. (N. S.) p. 232.

(*n*) 2 Bell's Com. 506.

(*o*) L. R. 5 P. C. 394.

(*p*) 15 R. 290.

(*q*) 14 R. 75.

(*r*) 17 R. 596.

Section 11.

11. In the following cases; namely:—

Misapplication of money or property received for or in custody of the firm.

(*a.*) Where one partner acting within the scope of his apparent authority receives the money or property of a third person and misapplies it; and

(*b.*) Where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm;

the firm is liable to make good the loss.

"Partnership," pp. 151 *et seq.*

The liability of the partners under this section is joint and several, see § 12.

Sub-section (*a*). Sub-section (*a*) is in accordance with the law laid down in *Willett* v. *Chambers* (1778) (*s*) and *Brydges* v. *Branfill* (1841) (*t*) and the other cases collected in "Partnership," pp. 151 *et seq.*

"*His apparent authority*," i.e. his authority as evidenced by the business of the firm. Money received for the firm by a partner within the scope of his apparent authority is received by the firm (see § 5 and "Partnership," p. 150).

For instances in which a firm has been held liable, see "Partnership," pp. 151 *et seq.*

For instances in which a firm has been held not liable on the ground that the partner who received the money was not acting within his apparent authority, see "Partnership," pp. 155 *et seq.*

Sub-section (*b*). Sub-section (*b*) is in accordance with the law laid down in *Clayton's Case* (1816) (*u*), *Baring's Case* (1816) (*x*), *Blair* v. *Bromley* (1847) (*y*), and other cases collected in "Partnership," pp. 152 *et seq.*

The fact that particular members of the firm have no knowledge of the receipt of the money in question is immaterial, if the money was received in the course of the business of the firm (*z*).

In order that the firm may be liable, the money must be misapplied while in the custody of the firm. The cases of *Coomer* v. *Bromley* (1852) (*a*) and *Bishop* v. *Countess of Jersey* (1854) (*b*) are instances of firms escaping liability on the ground, amongst others, that at the time of the misappropriation the property was not in the custody of the firm (*c*).

Scotch Law.

Scotch Law. This is the existing law (*d*).

(*s*) Cowp. 814.
(*t*) 12 Sim. 369.
(*u*) 1 Mer. 575.
(*x*) 1 Mer. 611.
(*y*) 5 Ha. 542, and 2 Ph. 354.
(*z*) *Marsh* v. *Keating* (1834), 2 Cl. & F. 250.
(*a*) 5 De G. & Sm. 532.
(*b*) 2 Drew. 143.
(*c*) See these and other cases fully discussed, "Partnership," p. 158.
(*d*) 2 Bell's Com. 506; Clark, 253—254.

Sections 12—13.

Liability for wrongs joint and several.

12. Every partner is liable jointly with his co-partners and also severally for everything for which the firm while he is a partner therein becomes liable under either of the two last preceding sections.

"Partnership," pp. 198 *et seq.*

This section is in accordance with the existing law. The difficulty and importance, alluded to above (p. 31), of distinguishing between obligations which arise from contract and those which arise from tort still remains, the former are governed by § 9, the latter by this and the two preceding sections.

Partners are jointly and severally liable, in the same way and to the same extent as other principals and masters, for the torts of their agents and servants acting within the scope of their authority or employment. This liability does not belong to the law of partnership, and therefore is not dealt with by this act.

Scotch Law.

See note on section 9.

Improper employment of trust-property for partnership purposes.

13. If a partner, being a trustee, improperly employs trust-property in the business or on the account of the partnership, no other partner is liable for the trust-property to the persons beneficially interested therein:

Provided as follows:—

(1.) This section shall not affect any liability incurred by any partner by reason of his having notice of a breach of trust; and

(2.) Nothing in this section shall prevent trust money from being followed and recovered from the firm if still in its possession or under its control.

"Partnership," pp. 160 *et seq.*

As pointed out by Sir Frederick Pollock (*e*), the liability of one partner for breaches of trust committed by his co-partner is not a partnership liability. The liability of each partner depends upon whether or not he has notice of the breach of trust and not upon the relation of partnership existing between the members of the firm (*f*).

Cases under this section should be distinguished from the cases dealt with by section 11; that section deals with money which comes or is treated as coming to the hands of the firm in the ordinary course of its business, this section deals with money which comes into the hands of the firm improperly.

As to the rights of the executors of a deceased partner against the sur-

(*e*) Digest of the Law of Partnership (5th ed.), p. 48.

(*f*) See proviso (1) and cases collected, "Partnership," pp. 160 *et seq.*

viving partners, where the share of the deceased partner has been left in the business without any final settlement of accounts, see *infra*, § § 42 and 43. Section 13.

This proviso imposes no liability upon partners who have notice of a breach of trust, but leaves them to the general law (*g*). Proviso (1).

There is some doubt how far a partner, who joins a firm which is at the time to the knowledge of the incoming partner improperly employing trust monies in its business, is liable for the breach of trust if he merely leaves matters as he finds them (*h*).

Persons implicated in a breach of trust are jointly and severally liable to the beneficiaries for the loss incurred, although as between themselves they are not all equally to blame (*i*).

Notice. Knowledge of the breach of trust on the part of one partner will not affect the others, for the fact to be known has nothing to do with the partnership affairs. Actual knowledge is not necessary (*k*), but any partner who ought to be treated as knowing that trust monies are being employed in the business of the firm, will be held bound to see that the trust to which the money is subject authorises the use made of it, and will be answerable for a breach of trust in case of its misapplication or loss (*l*). Notice.

As to the right of following trust monies, see Lewin on Trusts, chap. xxx. § 2; "Partnership," p. 162, note (*i*); and *Lister & Co.* v. *Stubbs* (1890) (*ll*). Proviso (2).

Scotch Law.

This appears to be the existing law: *Cochrane* v. *Black* (1855—57) (*m*) is an illustration of liability enforced against partners who were trustees. See further explanation of this case under § 42 (1), *infra*. In *Macfarlane* v. *Donaldson* (1835) (*n*), a firm of solicitors and the individual partners were made liable for the intromissions of a partner who was *factor loco tutoris* to a pupil, and to their knowledge immixed the funds of the factory with the firm funds. In the case of *Cochrane*, *supra*, from the firm's balance sheets it must have been known to the partner who was not a trustee that the trust funds were used in the business. See also *Laird* v. *Laird* (1855) (*o*). Scotch Law.

(*g*) See "Partnership," pp. 160 *et seq.*

(*h*) *Twyford* v. *Trail* (1834), 7 Sim. 92.

(*i*) Lewin, 8th ed. p. 908; *Oxford Benefit Building Society* (1886), 35 Ch. D. 502; *Leeds Estate Building Co.* v. *Shepherd* (1887), 36 Ch. D. 787. As to the rate of interest charged in such cases, see Lewin, pp. 340 *et seq.*

(*k*) See *Marsh* v. *Keating* (1834), 2 Cl. & Fin. p. 289.

(*l*) *Ex parte Woodin* (1845), 3 M. D. & D. 399; *Ex parte Poulson* (1844), De Gex 79, and other cases cited, "Partnership," p. 161, note (*c*). And generally as to notice see Watson's Compendium of Equity (ed. 2), vol. ii. p. 1149.

(*ll*) 45 Ch. Div. 1.

(*m*) 17 D. 321; 19 D. 1019.

(*n*) 13 S. 725.

(*o*) 17 D. 984.

Section 14.

Persons liable by "holding out."

14.—(1.) Every one who by words spoken or written or by conduct represents himself, or who knowingly suffers himself to be represented, as a partner in a particular firm, is liable as a partner to any one who has on the faith of any such representation given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made.

(2.) Provided that where after a partner's death the partnership business is continued in the old firm-name, the continued use of that name or of the deceased partner's name as part thereof shall not of itself make his executors or administrators estate or effects liable for any partnership debts contracted after his death.

SUB-SECTION 1.

"Partnership," pp. 40 *et seq.*

Sub-section (1).

The rule of law contained in this sub-section has long been recognised (*p*), and is merely a particular instance of the general principle of estoppel by conduct.

This section gives rise to the question whether a person, held out as a partner without his own consent, will incur liability, if, knowing that he is being so held out, he takes no steps to prevent it being done (see "Partnership," p. 217).

Before the act, in order that a person who had been represented as a partner might be liable as such, two conditions must have been fulfilled, first, the representation must have been made either by the person himself or with his consent, secondly, the person seeking to avail himself of the representation must have known of it and given credit to the firm on the faith of it (*q*). A person held out as a partner may be liable to others, although they may know that as between himself and his quasi partners he does not share either profits or losses, for the lending of his name may justify the belief that he is willing to be responsible to those who may be induced to trust to him for payment (*r*).

A person who represents himself as a partner will not be the less liable to third parties because he was induced to do so by promises of irresponsibility or by fraud (*s*).

If the representation be made by or with the consent of the person who is held out as a partner the manner in which this is done is immaterial. It may be by signing prospectuses (*t*), by being party to resolu-

(*p*) See for an early case, *Waugh* v. *Carver*, 2 H. Blacks. 235; and also *Scarf* v. *Jardine* (1882), 9 App. Ca. 345.

(*q*) "Partnership," pp. 42 *et seq.*

(*r*) *Brown* v. *Leonard* (1820), 2 Chitty 120, "Partnership," p. 41.

(*s*) "Partnership," pp. 41—42.

(*t*) *Collingwood* v. *Berkeley* (1863), 15 C. B. N. S. 145.

Section 14.

tions (*u*), by his own statements though not intended to be repeated (*x*), by a course of conduct (*y*), or by retiring from the firm and failing to give due notice of such retirement (*z*).

It should be noticed that clauses (*a*) to (*e*) of section 2, sub-section 3 of this act apply to liability arising from holding out as well as to liability from actual partnership (*a*).

As a partner.—A person who holds himself out as willing to become a partner does not incur liability by so doing (*b*), he must hold himself out as a partner.

In a particular firm.—These words will include the case of a person who holds himself out as a partner with a sole trader.

Given credit to the firm.—Unless credit has been given to the firm on the faith of the representation, the person representing himself as a partner will be under no liability. For example, the doctrine has no application to actions of tort arising from negligent conduct of a firm where no trust has been put in it (*c*).

Liable as a partner.—As to the extent of this liability, see §§ 9—13.

The difficulties in the way of the application of the rule as to holding out to cases where the firm name does not disclose the names of the partners are pointed out in "Partnership," pp. 45 and 46, and still exist (*d*).

Scotch Law.

Scotch Law. Holding out.

This comprehensive statement of the doctrine of "holding out" is in accordance with the existing law (*e*). The issue for a jury is, whether the defender held himself out, or allowed himself to be held out, as a partner of A. & Co.: whether the pursuers made furnishings in the belief that the defender was a partner; and whether the defender is indebted and resting owing, &c.: *Gardner* v. *Anderson* (1862) (*f*). The liability is direct to the person giving credit; and is not open to the trustee in bankruptcy of the firm for behoof of the creditors generally: *Mann* v. *Sinclair* (1879) (*f*).

SUB-SECTION 2.

Sub-section (2).

This sub-section is in accordance with the previous law (*g*). Even if the executor is the surviving partner using the old name this will make no difference (*h*).

(*u*) *Maddick* v. *Marshall* (1864), 16 C. B. N. S. 387, and 17 ib. 829.

(*x*) *Martyn* v. *Gray* (1863), 14 C. B. N. S. 824.

(*y*) *Wood* v. *Duke of Argyll* (1844), 6 Man. & Gr. 928; *Lake* v. *Duke of Argyll* (1844), 6 Q. B. 477.

(*z*) See *infra*, § 36, and "Partnership," pp. 121 *et seq.*

(*a*) See the words "or liable as such" in those clauses.

(*b*) *Bourne* v. *Freeth* (1829), 9 B. & C. 632, "Partnership," p. 44.

(*c*) See "Partnership," p. 47.

(*d*) See also *Newsome* v. *Coles* (1811), 2 Camp. 617, and *Scarf* v. *Jardine* (1882), 7 App. Ca. 345.

(*e*) 2 Bell's Com. 513.

(*f*) 24 D. 315; 6 R. 1078.

(*g*) *Webster* v. *Webster* (1791), 3 Swanst. 490, and other cases cited, "Partnership," p. 47.

(*h*) *Farhall* v. *Farhall* (1871), 7 Ch. 123; *Owen* v. *Delamere* (1872), 15 Eq. 134, "Partnership," p. 47.

Sections 14—15.

Bankruptcy.

Though a bankrupt partner cannot by his acts bind his partners, a person may be liable for such acts if he holds himself out as the partner of the bankrupt after the bankruptcy (*i*).

As to the administration in bankruptcy when two persons trading as partners, though not so in reality, become bankrupt, see *Ex parte Hayman* (1878) (*k*), *Re Rowland & Crankshaw* (1866) (*l*), and *Ex parte Sheen* (1877) (*m*).

Scotch Law.

Scotch Law.

This is the existing law (*n*). Though not expressly decided, in Scotland the rule laid down by Lord Eldon in *Vulliamy* v. *Noble* (1817) (*o*) would apply (*p*).

Admissions and representations of partners.

15. An admission or representation made by any partner concerning the partnership affairs, and in the ordinary course of its business, is evidence against the firm.

"Partnership," p. 128.

This section introduces no alteration into the previous law. It deals only with the admissibility of admissions and representations, and not with their effect when admitted.

Admissions are not necessarily conclusive (*q*), but they and representations may be conclusive by way of estoppel.

As to the liability of a firm for the misrepresentations of one of its members, see § 10, *supra*, and the cases collected and examined, "Partnership," pp. 162 *et seq.*

For admissions or representations to be evidence against the firm the person making them must have been a partner at the time they were made (*r*).

The section only deals with admissions or representations made in the ordinary course of the partnership business, and therefore does not affect the rule that a firm is not bound by the representations by one of its members as to the extent of his individual authority (*s*), or the extent and nature of the business of the firm (*t*). For the same reason it does not alter the rule that in an action against partners the answer of one of them to interrogatories cannot be read against the others unless they have an opportunity of contradicting it (*u*).

(*i*) See *infra*, § 38.

(*k*) 8 Ch. Div. 11.

(*l*) 1 Ch. 421.

(*m*) 6 Ch. Div. 235.

(*n*) Clark, p. 59.

(*o*) 3 Mer. 614.

(*p*) More's Notes on Stair, p. 102. See also *Morrison* v. *Learmont* (1870), 8 Mc. 500.

(*q*) *Wickham* v. *Wickham* (1855), 2 K. & J. 491; *Stead* v. *Salt* (1825), 3 Bing. p. 103.

(*r*) *Tunley* v. *Evans* (1845), 2 Dowl. & L. 747; *Catt* v. *Howard* (1820), 3 Stark. 3.

(*s*) *Ex parte Agace* (1792), 2 Cox, 312. The bill as originally drawn contained a proviso to this effect.

(*t*) See "Partnership," p. 166.

(*u*) *Parker* v. *Morrell* (1846), 2

Sections 15—16.

In the bill as originally drawn this section only dealt with the admissibility of the admissions and representations of one partner so far as concerned the civil rights and liabilities of the partners. Does the section as it now stands make such admissions evidence in criminal cases?

Scotch Law.

SCOTCH LAW.

This is the existing law. The admission or representation falls under the implied mandate or *prepositura* of the partners.

Notice to acting partner to be notice to the firm.

16. Notice to any partner who habitually acts in the partnership business of any matter relating to partnership affairs operates as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner.

"Partnership," pp. 141 *et seq.*

As to what amounts to notice, see Watson's "Compendium of Equity" (ed. 2), Vol. II., p. 1149.

To any partner.—These words would perhaps justify a negative answer to the question discussed by Sir George Jessel (*x*), whether notice to a person who afterwards becomes a partner is notice to the firm.

Who habitually acts in the partnership business.—Notice to a dormant partner is not notice to the firm. If a partner, who habitually acts in the partnership business, receives notice, will the firm, under this section, be affected thereby, if at the time of receiving such notice he was not in any way acting for the firm? (*y*).

Breaches of trust.

Of any matter relating to partnership affairs.—If a partner, being a trustee, improperly employs trust money in the business, his knowledge is not imputable to the firm, for the fact that the money is trust money does not relate to the partnership business: see *supra*, § 13.

Notice will only affect the firm as constituted at the time such notice was received. A retired partner will not be affected with notice on the part of the continuing partners of what has occurred since the partnership, if the agency subsisting between them has been dissolved (*z*). Nor is an incoming partner affected with notice of what occurred before he joined the firm (*a*).

Fraud.

The exception at the end of the section is well established (*b*). Notice to the clerks of a firm of what a fraudulent partner is doing is no more than notice to him (*c*).

Ph. 453; *Dale* v. *Hamilton* (1846), 5 Ha. 393.

(*x*) *Williamson* v. *Barbour* (1877), 9 Ch. D. p. 535.

(*y*) See *Société Générale de Paris* v. *Tramways Union Co.* (1884), 14 Q. B. Div. pp. 443, 450.

(*z*) *Adams* v. *Bingley* (1836), 1 M. & W. 192.

(*a*) *Williamson* v. *Barbour* (1877), 9 Ch. D. p. 536.

(*b*) See *Williamson* v. *Barbour* (1877), 9 Ch. D. p. 535; *Lacey* v. *Hill* (1876), 4 Ch. D. p. 549.

(*c*) See cases in the last note.

Sections 16—17.

The section only deals with notice to a partner, a firm may be affected by notice to its other agents in the same way as any other principal.

Scotch Law.

Scotch Law.

This section does not appear to introduce any change. The exception does not refer to *bonâ fide* notice to a partner who proves fraudulent; but to notice by a third party to a partner with whom he is united in committing a fraud on the firm. Notice to such a partner will not operate as notice to the firm.

Liabilities of incoming and outgoing partners.

17.—(1.) A person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of the firm for anything done before he became a partner.

(2.) A partner who retires from a firm does not thereby cease to be liable for partnership debts or obligations incurred before his retirement.

(3.) A retiring partner may be discharged from any existing liabilities, by an agreement to that effect between himself and the members of the firm as newly constituted and the creditors, and this agreement may be either express or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted.

"Partnership," pp. 206 *et seq.*

This section does not introduce any change into the existing law.

SUB-SECTION 1.

Sub-section 1.

For cases illustrating sub-section (1), see "Partnership," pp. 206 *et seq.*

An incoming partner is, however, liable for debts arising out of a contract entered into by the firm before he joined, if they are in reality new debts; as in the case of *Dyke* v. *Brewer* (1849) (*d*). In that case the plaintiff contracted with A. to sell him bricks at so much a thousand, and began to supply them accordingly. B. then entered into partnership with A., and the plaintiff continued to supply the bricks. It was held that A. and B. were liable to pay, at the rate agreed upon, for the bricks supplied to both after the commencement of the partnership, on the ground that, as A. had not ordered any definite number of bricks, each delivery and acceptance raised a new tacit promise to pay on the old terms.

Dyke *v.* Brewer.

An incoming partner may by agreement, either express or implied, between himself and the creditors of the firm, make himself liable for the debts of the firm contracted before he became a partner; but an agreement

(*d*) 2 Car. & Kir. 828, and see also *Helsby* v. *Mears* (1826), 5 B. & C. 504, explained in *Beale* v. *Moule* (1847), 10 Q. B. 976.

between the incoming partner and his co-partners that the debts of the old shall be taken by the new firm does not of itself give the creditors any right to sue the new partner for the old debts (*e*).

Section 17.

Scotch Law.

SCOTCH LAW.

Liability of new partner for old debts.

Conflict of judicial opinion.

This proposition expresses the existing law, in the sense that the mere admission of a partner does not subject him to liability for prior debts. "All are agreed that liability for the debts of a pre-existing business does not arise merely from joining a new partnership by which the same business is to be continued." Lord Craighill, in *Nelmes* v. *Montgomery* (1883) (*f*). "The contention for the pursuers comes to nothing short of this, that a man who joins any trader as a partner becomes liable in consequence for all the debts which that trader owes, so far as connected with the business which he has carried on. Is there any authority for that, or any principle? I should say none; and it seems to me irrational on the statement of it. Such liability would go as far back as it is possible to prove the debts." .... "I can listen to no proposition which disputes that a partner admitted into partnership in a going concern takes his share of profit and loss from the date of his admission to the partnership, and from no other time, in the absence of stipulation to the contrary." Lord Young (*g*). In that case there was no undertaking by the new firm, either express or implied from conduct, of the obligations of the old firm; nor was there evidence that all the assets of the old firm were transferred to the new. Accordingly, the new partner was held not liable for the price of certain billiard tables purchased a year before he joined, and used in carrying on the business.

Nevertheless, in a prior case the law was stated by Lord Justice Clerk (now Lord President) Inglis, thus:—"As a matter of general principle it appears absurd to hold that a person in trade by taking his son into partnership can do anything to injure the rights of his trade creditors; and the way in which the law interposes, in such a case, to prevent injustice, is by holding that where a new firm takes over the whole stock and business of a going concern, it is held also to take over the whole liabilities. In short, the business being taken over, and not wound up, the business and its liabilities must be held to go together. That is matter of general principle, which was established by the cases of *McKeand* (*h*) and *Ridgeway* (*i*), and I see nothing to take this case out of it." *Miller* v. *Thorburn* (1861) (*k*). Lord Cowan in the same case says, "I concur in the principle given effect to in the cases of *Ridgeway* and *McKeand*, that, in the general case, where the whole estate of a company is given over to, and taken possession of by a new concern or partnership, the business being continued on the same

(*e*) See "Partnership," p. 208, and the cases there cited.

(*f*) 10 R. 974, 981.

(*g*) P. 980.

(*h*) *McKeand* v. *Laird* (1860), 23 D. 846.

(*i*) *Ridgeway* v. *Brock* (1831), 10 S. 105.

(*k*) 23 D. 359. Lord Justice Clerk and Lord Cowan, p. 362.

Section 17.

footing, the estate goes to the new company *suo onere*, that is, the liabilities go along with the effects. To sustain any other principle might result in the greatest injustice. This is the general presumption, although there may be special circumstances in particular cases not admitting of its application. In this case there are no such specialties. Of course private debts are not in the same position as trade debts." The liability in question was a cash credit contracted, for the purposes of the business, by a father long before he assumed his son as a partner; and the ground of judgment was that "taking the whole facts, the new firm must be held to have assumed the responsibilities as well as the assets of the former company."

These cases were followed by *Heddle* v. *Marwick* (1888) (*l*), in which the doctrine of *Miller* v. *Thorburn* was emphatically re-affirmed, notwithstanding the *dicta* in *Nelmes*. It was held that the facts clearly showed that the debt in dispute was assumed, taken over, and all along dealt with as a debt of the new firm; and accordingly on its bankruptcy a creditor of the old firm was found entitled to rank in the sequestration of the new one. Again in *Stephen* v. *MacDougall* (1889) (*m*), where it was equally clear that the debt and the security had not been taken over by the new company, an opposite conclusion was reached.

Effect of sub-section 1.

The presumption referred to in *Miller* v. *Thorburn* is said, by the Lord President, to arise "where a new firm takes over the whole stock and business of a going concern." As this is almost implied in the admission of "a partner into an existing firm," it would appear that any such presumption is over-ruled by this sub-section.

Sub-section 2.

Sub-section 2.

A partner who retires from a firm may become liable for debts contracted after he has left the firm, if he omits to give due notice of his retirement. See *infra*, § 36.

Scotch Law.

Scotch Law. Liability of retired partner.

This is trite law (*n*). It is applied even where the retiring partner had paid his partners enough to meet the debt sued for: *Anderson* v. *Rutherfurd* (1835) (*o*). In the case of banking partnerships the customer does not lose his right by allowing the money to remain with the continuing partners. See *Ramsay* v. *Grahame* (1814) (*p*); *Devaynes* v. *Noble* (1816) (*q*), *per* Sir Wm. Grant, M.R. But a retired partner is not in general liable for advances made after retirement upon a cash credit opened before: *Padon* v. *Bank of Scotland* (1826) (*r*); but in special circumstances he may: *Aytoun* v. *Dundee Bank* (1844) (*s*).

(*l*) 15 R. 698.
(*m*) 16 D. 779.
(*n*) 2 Bell's Com. 528.
(*o*) 13 S. 488.
(*p*) 18th Feb. 1814, F. C.
(*q*) 1 Meriv. 530.
(*r*) 5 S. 160.
(*s*) 6 D. 1409.

SUB-SECTION 3.

The numerous cases illustrating this proposition are collected and examined in "Partnership," pp. 239 *et seq.*

The difficulty in these cases is one of fact, whether such an agreement as is here dealt with has or has not been entered into. There is no presumption in favour of any such agreement having been entered into (*t*).

Without referring to all the cases on this subject it may be useful to reprint here the review of their effect given in "Partnership," on p. 253. The cases there examined establish that:—

1. An express agreement by the creditor to discharge a retired partner, and to look only to a continuing partner, is not inoperative for want of consideration; for *Lodge* v. *Dicas*, (1820) (*u*) has, as to this point, been overruled by *Thompson* v. *Percival* (1834) (*x*);

2. An adoption by the creditor of the new firm as his debtor does not by any means necessarily deprive him of his rights against the old firm either at law (*y*) or in equity (*z*);

3. And it will certainly not do so if, by expressly reserving his right against the old firm, he shows that by adopting the new firm he did not intend to discharge the old firm (*a*);

4. And by adopting a new firm as his debtor, a creditor cannot be regarded as having intentionally discharged a person who was a member of the old firm, but was not known to the creditor so to be (*b*);

5. But the fact that a creditor has taken from a continuing partner a new security for a debt due from him and a retired partner jointly, is strong evidence of an intention to look only to the continuing partner for payment (*c*).

6. And a creditor who assents to a transfer of his debt from an old firm to a new firm, and goes on dealing with the latter for many years, making no demand for payment against the old firm, may not unfairly be inferred to have discharged the old firm. If a jury finds that he has done so, the

(*t*) *Lyth* v. *Ault* (1852), 7 Ex. 669.

(*u*) 3 B. & A. 611.

(*x*) 5 B. & Ad. 925.

(*y*) *David* v. *Ellice* (1826), 5 B. & C. 196; *Thompson* v. *Percival* (1834), 5 B. & Ad. 925; *Heath* v. *Percival* (1720), 1 P. W. 682, and 1 Str. 403; *Kirwan* v. *Kirwan* (1834), 2 Cr. & M. 617; *Gough* v. *Davies* (1817), 4 Price, 200; *Blew* v. *Wyatt* (1832), 5 C. & P. 397.

(*z*) *Oakford* v. *European, &c., Ship Co.* (1863), 1 Hem. & M. 182; *Sleech's case* (1816), 1 Mer. 539; *Clayton's case* (1816), ib. 579, *Palmer's case* (1816), ib. 623; *Braithwaite* v. *Britain* (1836), 1 Keen, 206; *Winter* v. *Innes* (1838), 4 M. & Cr. 101.

(*a*) *Bedford* v. *Deakin* (1818), 2 B. & A. 210; *Jacomb* v. *Harwood* (1721), 2 Ves. S. 265.

(*b*) *Robinson* v. *Wilkinson* (1817), 3 Price, 538.

(*c*) *Evans* v. *Drummond* (1801), 4 Esp. 89; *Reed* v. *White* (1804), 5 ib. 122.

Sections 17—18.

Court will not disturb the verdict (*d*); and if the question arises before a judge, *e.g.*, in bankruptcy or in the administration of the estate of a deceased partner, the Court will consider all the circumstances of the case, and will infer a discharge if upon the whole justice to all parties so requires (*e*). But the small number of cases in which relief has been refused, compared with those in which it has been granted, shows that the leaning of the Court is strongly in favour of the creditor.

In addition to discharge by agreement dealt with by this section a retiring partner may be discharged from his liability by

(1) Bankruptcy.
(2) Payment. See "Partnership," pp. 225 *et seq.*
(3) Release. See *ib.*, pp. 237 *et seq.*
(4) Merger of securities. See *ib.*, p. 254.
(5) Lapse of time. See *ib.*, pp. 257 *et seq.*

Deceased partner.

The same principles which govern the discharge of a retiring partner are applicable to the discharge of the estate of a deceased partner (*f*).

Scotch Law.

Scotch Law. *Novatio debiti.*

This is the existing law,—an application of the doctrine of *novatio debiti*. As the presumption is against novation, the agreement, if not in express terms, must be established by unequivocal actings: *Buchanan* v. *Adam* (1833) (*g*); *Campbell* v. *Cruickshank* (1845) (*h*); *Ker* v. *McKechnie* (1845) (*i*); *Blacks* v. *Girdwood* (1885) (*k*). Only in the case of *Ker*, where the discharge was express and in writing, was the evidence held sufficient. See also *Scarf* v. *Jardine* (1882) (*l*).

Revocation of continuing guaranty by change in firm.

18. A continuing guaranty or cautionary obligation given either to a firm or to a third person in respect of the transactions of a firm is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or of the firm in respect of the transactions of which, the guaranty or obligation was given.

"Partnership," pp. 117 *et seq.*

This section replaces § 7 of the Mercantile Law Amendment (Scotland)

(*d*) *Hart* v. *Alexander* (1837), 2 M. & W. 484.

(*e*) *Ex parte Kendall* (1811), 17 Ves. 522—527; *Oakeley* v. *Pasheller* (1836), 4 Cl. & Fin. 207; *Wilson* v. *Lloyd* (1873), 16 Eq. 60; *Brown* v. *Gordon* (1852), 16 Beav. 302.

(*f*) See "Partnership," pp. 249 *et seq.*

(*g*) 11 S. 762.

(*h*) 7 D. 548.

(*i*) 7 D. 494.

(*k*) 13 R. 243.

(*l*) 7 App. Ca. 345.

act, 1856, and § 4 of the Mercantile Law Amendment act, 1856, which are repealed by § 48 of the present act. Section 18.

The wording of the present section differs considerably from that of the previous acts, but so far at least as relates to England, it does not appear to have introduced any alteration in the law.

The text of the repealed section of the Mercantile Law Amendment act, 1856 (19 & 20 Vict. c. 97, § 4), will be found in "Partnership," p. 119, and cases illustrating that section on pp. 117 *et seq.*

As to what is a continuing guaranty, see Smith's Mercantile Law, Ed. 10, pp. 579 *et seq.*

Deposit of securities.

This section only deals with continuing guarantees, but the same principle applies to the somewhat analogous case where securities have been deposited with bankers to secure further advances. *Primâ facie* the securities extend only to advances which are made by the firm, whilst its members continue the same as when the securities were deposited (*m*). But a security given to a firm for advances to be made by it, is, upon a change in the firm, readily made a continuing security; and a slight manifestation on the part of the borrower that it should so continue, will enable the new firm to hold the securities until the advances made by itself, as well as those made by the old firm, have been repaid (*n*).

Scotch Law.

Scotch Law. Continuing guarantee.

The change referred to is in the constitution of the firm either of the creditor or debtor. Professor Bell, writing before the Mercantile Law Amendment Acts, 1856, points out the inconvenience to a banking firm and its customers of having all its bonds of credit renewed upon every change among its partners; and adds: "but there does not seem in law to be any necessity for this, and generally there is a stipulation against it in the bond." The case, however, is different (he says) with changes in the debtor's firm, for they may materially affect the risk (*o*).

Report of Law Commission.

On this subject the Law Amendment Commissioners reported that it was doubtful whether any substantial difference existed between the laws of the different parts of the United Kingdom, but in order to extinguish such doubts, recommended that a guarantee, whether to or for a firm, should cease as to fresh transactions when a change takes place in the partners, unless the contrary appears, either expressly or by implication, to be the intention (*p*).

The enactment took the form of § 4 and § 7 in the English and Scotch Mercantile Law Amendment Acts, 1856, respectively (*q*), which provided

(*m*) See *per* Lord Eldon in *Ex parte Kensington* (1813), 2 V. & B. 83.

(*n*) See "Partnership," pp. 119—120.

(*o*) 1 Bell's Com. 387—388.

(*p*) Second Report (1855), p. 12.

(*q*) 19 & 20 Vict. c. 97, and 19 & 20 Vict. c. 100.

Section 18. that no guarantee granted "to or for a company or firm consisting of two or more persons, or to or for a single person trading under the name of a firm" should be binding after a change in any one or more of the partners of the company or firm, to or for which it was granted; unless the intention of the parties that it should continue to be binding notwithstanding the change should "appear either by express stipulation or by necessary implication from the nature of the firm or otherwise." These sections are repealed by § 48 of this act, but the present section is in substance a re-enactment thereof. The exception, indeed, is differently expressed, the words being simply "is, in the absence of agreement to the contrary, revoked," which however have the same meaning.

Relations of Partners to one another.

19. The mutual rights and duties of partners, whether ascertained by agreement or defined by this Act, may be varied by the consent of all the partners, and such consent may be either express or inferred from a course of dealing.

Variation by consent of terms of partnership.

"Partnership," pp. 408 *et seq.*

The law upon which this section is based is clearly stated by Lord Eldon in *Const* v. *Harris* (1824) (*l*), and by Lord Langdale in *England* v. *Curling* (1844) (*m*); and other cases illustrating its application will be found discussed or referred to in "Partnership," pp. 408 *et seq.*

By the consent of all the partners.—The mutual rights and duties of partners cannot be varied except by the consent of all the partners, and the passage in Lord Eldon's judgment in *Const* v. *Harris* (*n*), in which he says that "that is the act of all which is the act of the majority, provided all are consulted and the majority are acting *bonâ fide*," is only true of cases in which the majority has the power of binding the minority; as to which see *infra*, § 24 (8), and notes.

It appears that a person who comes into a firm, or claims an interest in partnership property, under another who has acquiesced in the variation of the terms of the partnership articles, is bound by that acquiescence and cannot revert to the original articles (*o*).

For the usual clauses contained in partnership agreements, and the principles governing their construction, see "Partnership," pp. 406 *et seq.*

Scotch Law.

Scotch Law. Variation of contract of copartnery.

The mode of proving the variation of a written contract of copartnery will be in accordance with the general rules of evidence. Although parole is in general inadmissible to contradict or modify a written contract, yet it is admissible to prove acquiescence in actings inconsistent with the written contract, to the effect of establishing a new or altered agreement. *Wark* v. *Bargaddie Coal Co.* (1856) (*p*); *Sutherland* v. *Montrose Shipbuilding Co.* (1860) (*q*). *Kirkpatrick* v. *Allanshaw Co.* (1880) (*r*). In *Geddes* v. *Wallace* (1820) (*s*), the House of Lords held that the circumstances, including the conduct of the partners, shewed that the real intention of

(*l*) T. & R. at p. 523.
(*m*) 8 Beav. p. 133.
(*n*) T. & R. p. 524—525.
(*o*) *Const* v. *Harris* (1824), T. & R. p. 524. See also *Ffooks* v. *South Western Ry.* (1853), 1 Sm. & G. 168; and *Peek* v. *Gurney* (1871), 13 Eq. 79.
(*p*) 18 D. 556, revd. 3 Macq. App. 467.
(*q*) 22 D. 665.
(*r*) 8 R. 327.
(*s*) 2 Bligh. 270.

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parties had been different, or that a new agreement had been entered into. In *Barr's Trustees* v. *Barr and Shearer* (1886) (*l*), an attempt to vary a written contract of copartnery by parole evidence was disallowed.

Partnership property.

20.—(1.) All property and rights and interests in property originally brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of the partnership business, are called in this Act partnership property, and must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement.

(2.) Provided that the legal estate or interest in any land, or in Scotland the title to and interest in any heritable estate, which belongs to the partnership shall devolve according to the nature and tenure thereof, and the general rules of law thereto applicable, but in trust, so far as necessary, for the persons beneficially interested in the land under this section.

(3.) Where co-owners of an estate or interest in any land, or in Scotland of any heritable estate, not being itself partnership property, are partners as to profits made by the use of that land or estate, and purchase other land or estate out of the profits to be used in like manner, the land or estate so purchased belongs to them, in the absence of an agreement to the contrary, not as partners, but as co-owners for the same respective estates and interests as are held by them in the land or estate first mentioned at the date of the purchase.

"Partnership," pp. 322 *et seq.*

It is within the power of the partners by agreement between themselves to decide what property shall, or shall not, be partnership property, and the rules laid down in this and the following section are only applicable to cases in which there is no agreement, express or implied, excluding their application (see *supra*, § 19). In every case it will be necessary to examine all the circumstances to see whether or not there is any agreement between the partners.

SUB-SECTION 1.

Sub-section (1).

This sub-section appears only to state the law which may be deduced from the numerous cases on the subject, which will be found collected and examined in "Partnership," pp. 322 *et seq.*

(*l*) 13 R. 1055.

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Property.—This word is not defined by the present act. It is not, however, a word of art and must be taken in an ordinary sense (*u*).

Goodwill.

The goodwill of a business forms part of the partnership property and in the absence of an agreement to the contrary any partner may upon a dissolution insist upon having it sold for the benefit of all the partners (*x*).

The right to continue to use the firm name is often the most important element in the goodwill, but if the firm name contains as part of it, the name of a retiring partner, such partner can, in the absence of an agreement to the contrary, prevent the continued use of the name, for otherwise he might incur liability under the doctrine of holding out (*y*). A sale by him of his interest in the goodwill includes the right to use the old name even if it be his own (*z*), but not the right to expose him to any risk by so doing (*zz*).

For the rights of the vendors and purchasers of the goodwill of a business see "Partnership," pp. 439—448.

An agreement for the sale of goodwill must now bear an ad valorem stamp (*a*).

Offices.

A question sometimes arises whether the profits of offices and appointments held by one partner belong to him or to the firm. On this subject see *Collins* v. *Jackson* (1862) (*b*), *Smith* v. *Mules* (1851) (*c*), and *Ambler* v. *Bolton* (1872) (*d*).

Acquired . . . on account of the firm.—See *infra*, § 21.

It should be recollected that any property, which one partner may have acquired in breach of the good faith which ought to regulate the conduct of partners *inter se*, is considered as acquired on behalf of the firm and forms part of the partnership assets: see *infra*, §§ 29 and 30.

Or for the purposes and in the course of the partnership business.—Very difficult questions have arisen when land has been devised to persons who are already partners and is used by them for the purposes of the partnership business. The leading cases on this subject, which will be found stated or referred to in "Partnership," pp. 331 *et seq.*, are *Morris* v. *Barrett* (1829) (*e*), *Brown* v. *Oakshot* (1857) (*f*), *Phillips* v. *Phillips* (1832) (*g*), *Jackson* v. *Jackson* (1814) (*h*), *Crawshay* v. *Maule* (1818) (*i*), *Waterer* v. *Waterer* (1873) (*k*), and *Davies* v. *Games* (1879) (*l*). The present section does not lend much assistance in solving such questions, for such lands though used for the partner-

(*u*) See per Bramwell, B., in *Queensbury Industrial Society* v. *Pickles* (1865), L. R. 1 Ex. at p. 4—5.

(*x*) *Pawsey* v. *Armstrong* (1881), 18 Ch. D. 698; *Bradbury* v. *Dickens* (1859), 27 Beav. 53, and other cases cited, "Partnership," pp. 439 *et seq.*

(*y*) See *supra*, § 14; *Gray* v. *Smith* (1889), 43 Ch. D. 208, and "Partnership," pp. 444 *et seq.*

(*z*) *Levy* v. *Walker* (1878), 10 Ch. D. 436; *Banks* v. *Gibson* (1865), 34 Beav. 566.

(*zz*) *Thynne* v. *Shove* (1890), 45 Ch. D. 577.

(*a*) Revenue Act, 1889, 52 & 53 Vict. c. 42, § 15; *Potter* v. *Commissioners of Inland Revenue* (1854), 10 Ex. 147.

(*b*) 31 Beav. 645.

(*c*) 9 Ha. 556.

(*d*) 14 Eq. 427.

(*e*) 3 Y. & J. 384.

(*f*) 24 Beav. 254.

(*g*) 1 M. & K. 649.

(*h*) 9 Ves. 591; and 7 Ves. 535.

(*i*) 1 Swanst. 495.

(*k*) 15 Eq. 402.

(*l*) 12 Ch. D. 813.

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ship business can hardly be said to be acquired for the purposes and in the course of the partnership business.

Conversion of partnership property into separate property.

And must be held, &c.—That is, until by agreement between all the partners, such property ceases to be partnership property. That partnership property can be converted into the separate property of one partner by agreement between the partners themselves, and that such conversion, apart from fraud, will be binding on creditors, was decided at the commencement of this century in *Ex parte Ruffin* (1801) (*m*) and *Ex parte Williams* (1805) (*n*). It should be remembered that in the event of bankruptcy, the trustee, as representing the creditors, may be able to impeach as fraudulent against them agreements by which the bankrupt himself would have been bound (*o*).

Scotch Law.

Scotch Law. Partnership property.

Professor Bell's description of the partnership property is to the same effect. He adds,—"All this, by the operation of law and the nature and effect of the contract, becomes common property, is held by all the partners jointly" (*i.e., pro indiviso*) "for the uses of the partnership, and is directly answerable as a stock for the payment of its debts" (*p*). And he points out that while the contract of partnership has the effect of a direct conveyance (*titulus transferendi dominii*) of property to the firm, that does not supersede the necessity of the completion of the transference by delivery, possession, or intimation, which vest the property in the partners for the firm. "Where the question is between the parties and their representatives, as to what shall be considered as the estate of the company, but without involving any competition with third parties, whatever falls under the fair construction of the contract will, as a personal right, belong to the company and its creditors. But where there arises a competition, depending on the question of real right, it will be determined according to that criterion of real right which the law has appointed in cases of transference" (*q*). In the former case it is a *jus ad rem*, in the latter a *jus in re*. In both cases the right must be established by appropriate evidence; but in the former the intention of parties will rule, in the latter the rights of third parties to attach or otherwise affect the property can only be displaced by a completed transfer to, or vesting in the firm, or a partner or other person on its behalf.

Moveables.

As to moveables, possession by a partner will be presumed to be for the firm; but funds or commodities in the hands of third parties require to be delivered actually or constructively, or assigned, and the assignation intimated. In a question between partners the mere use of heritable property for partnership purposes is not conclusive: *Sime* v. *Balfour* (1804) (*r*), *Wilson* v. *Threshie* (1826) (*s*); and the terms of the feudal title

(*m*) 6 Vesey, 119.
(*n*) 11 Vesey, 3. For other cases see "Partnership," pp. 334 *et seq.*
(*o*) See "Partnership," p. 338.
(*p*) 2 Bell's Com. 500.
(*q*) 2 Bell's Com. 501.
(*r*) M. App. Herit. & Mov. No. 3.
(*s*) 4 S. 366.

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will yield to evidence (such as entries in the firm's books) that the property truly belongs to the firm: *Campbell* (1805) (*t*), *Minto* v. *Kirkpatrick* (1883) (*u*).

Ships.

As to the transfer of ships, see the Merchant Shipping Amendment Act, 1862, § 3 (*x*), and *Watson* v. *Duncan* (1879) (*y*).

Insurance policy.

In *Forrester* v. *Robson* (1875) (*z*), a life policy taken out in name of a partner of one of two firms, and payable to his executors, administrators, and assignees, formed the security for a loan to these firms, and the premiums were paid by them. On the death of the partner, the proceeds of the policy after meeting the loan were held to belong to the two firms as partnership property. As to the mode of proof, doubt was expressed whether the act of 1696, c. 25, confining proof of trust to writ or oath of party, did not apply; and in the case of *Laird* v. *Laird and Rutherford* (1884) (*a*), where a patent was taken in name of a partner and another person, it was held that proof *pro ut de jure* was under that act inadmissible. But an averment that money deposited in bank in name of a partner really belongs to the firm is provable by parole, on the ground that the averment resolves itself into one of partnership and not of trust: *Baptist Churches* v. *Taylor* (1841) (*b*).

Mode of proof.

Acquisition in partner's name.

Property or rights acquired by a partner in his own name, in the line of the firm's business, and during its subsistence, are held to belong to the firm: *Marshall* (1815) (*c*); *McNiven* v. *Peffers* (1868) (*d*); *Davie* v. *Buchanan* (1880) (*e*). So also commissions or discounts received by a partner in connection with the business belong to the firm: *Pender* v. *Henderson* (1864) (*f*); illustrations of which also occur in the law of public companies.

Application.

The partnership property is applicable in the first place to partnership obligations. Creditors of the firm have a right prior to creditors of a partner; for a partner's interest in a firm, which is available for his creditors (*infra*, § 23), only emerges after the firm debts are provided for (*g*).

Sub-section 2.

Sub-section (2).

Devolution of legal estate in land.

The result of the rule contained in this sub-section in England is that if several partners are seised of land forming part of the partnership property as joint tenants, the legal estate will, on the death of one, accrue to the survivor or survivors. But if an estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments corporeal or incorporeal, other than lands of copyhold or customary tenure,

(*t*) 2 Bell's Com. 565, note.
(*u*) 11 S. 632.
(*x*) 25 & 26 Vict. c. 63.
(*y*) 6 R. 1247.
(*z*) 2 R. 755.
(*a*) 12 R. 294.
(*b*) 3 D. 1030.
(*c*) F. C. 26th Jan. 1815; 23rd Feb. 1816.
(*d*) 7 Mc. 181.
(*e*) 8 R. 319.
(*f*) 2 Mc. 1428.
(*g*) 2 Bell's Com. 501.

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is partnership property and vested in one person solely (and this would be the case as to each partner's undivided interest in the land where they are tenants in common) such estate or interest will, upon the death of such person, devolve upon his legal personal representatives (*h*).

Scotch Law.

SCOTCH LAW. Heritage.

The beneficial interest in the heritable estate, being established by appropriate evidence to belong to the partnership, the partner or other person in whose name the title stands holds in trust for the firm, and thereby in the first place for creditors (effect being given to any preference obtained by way of security or diligence), and in the second place for the partners, according to their rights under their contract. The appropriate form of title to heritable estate belonging to a partnership is in favour of the partners by name, and the survivors and survivor as trustees for the firm; but a lease may be validly granted to a firm *socio nomine*; *Dennistoun, McNair & Co.* (*i*).

SUB-SECTION 3.

Sub-section (3).

Sub-section 3 is in accordance with the view taken in the case of *Steward* v. *Blakeway* (1869) (*k*), though a different inference was drawn from the facts in *Morris* v. *Barrett* (1829) (*l*) and *Waterer* v. *Waterer* (1873) (*m*). See also *supra*, § 2 (1).

Scotch Law.

SCOTCH LAW.

This does not seem to have been made the subject of decision in Scotland.

Property bought with partnership money.

21. Unless the contrary intention appears, property bought with money belonging to the firm is deemed to have been bought on account of the firm.

"Partnership," p. 329.

This section is in accordance with the previous law, and is illustrated by *The Bank of England's Case* (1861) (*n*).

Contrary intention.—For an instance where a contrary intention did appear, see *Smith* v. *Smith* (1800) (*o*). In that case the property, although paid for by the firm, was in fact bought for one partner, and he became a debtor to the firm for the purchase-money.

(*h*) See Conveyancing Act, 1881 (44 & 45 Vict. c. 41), § 30; Copyhold Act, 1887 (50 & 51 Vict. c. 73), § 45, and Wolstenholme & Turner's Conveyancing and Settled Land Acts, 5th ed. pp. 73—76.

(*i*) 16 Feb. 1808, F. C.

(*k*) 4 Ch. 603, and 6 Eq. 479.

(*l*) 3 Y. & J. 384.

(*m*) 15 Eq. 402; *Phillips* v. *Phillips* (1832), 1 M. & K. 649.

(*n*) 3 De G. F. & J. 645.

(*o*) 5 Ves. 189; also *Walton* v. *Butler* (1861), 29 Beav. 428, and "Partnership," p. 329.

Sections 21—22.

Where money of the firm has been laid out in improvements upon the separate property of one partner, the usual course upon a dissolution is to grant an enquiry whether, having regard to the terms of the partnership and the purposes for which the expenditure was made, any and what sums should be allowed to the partnership in respect of such outlay (*p*). The grounds upon which such an enquiry is directed are explained by Kay, J., in the case of *Pawsey* v. *Armstrong* (1881) (*q*), where money belonging to Pawsey & Armstrong as partners had been expended in the erection of buildings and works upon the separate property of Armstrong. The passage in the judgment referring to this point is as follows :—

Pawsey *v.* Armstrong.

"If this money was expended out of what would otherwise have been divided as partnership profits, *primâ facie* the effect of that would be to diminish the amount of profits to be divided. If it did diminish the amount of profits to be divided, then the extent to which it diminished Mr. Pawsey's profits may be treated as having been expended out of Mr. Pawsey's money. But it does not follow even then, that Mr. Pawsey is entitled to get that money back. It may be that the expenditure has been practically exhausted, that the partnership had the full benefit of it, and that nothing remains now to be divided or to be recovered in respect of that expenditure. It may be that it was expended with Mr. Pawsey's full consent, as he admits, and with his eyes open to the fact that his interest would be a determinable interest, and it may be that having permitted the expenditure to be made, knowing precisely what his interest was, that he is not now entitled to get back any part of it. I do not mean to prejudice even that question. On the other hand, it may be that he looked to the partnership continuing much longer than it has in fact continued. The expediture may have been so large that it is not an exhausted improvement even now, and it may be fair and right, looking to all the circumstances of the case, that he should have some portion of the money paid back to him in respect of that amount of profit which would otherwise have come to his share, and which has been expended upon these mills and cannot be treated as exhausted ; and it is in order not to prejudice that, and to give him any advantage which he is fairly entitled to upon that last head, that I shall direct an enquiry upon the subject" (*r*).

Scotch Law.

Scotch Law.

This is the existing law. In *Davie* v. *Buchanan* (1880) (*s*) the steamer was bought on the credit of the joint adventure. See also cases of *McNiven* and *Marshall*, referred to under § 20.

Conversion into personal estate.

22. Where land or any heritable interest therein has become partnership property, it shall, unless the contrary intention

(*p*) See *Pawsey* v. *Armstrong* (1881), 18 Ch. D. 698 ; *Burdon* v. *Barkus* (1862), 3 Giff. 412 ; 4 De G. F. & J. 42.

(*q*) 18 Ch. D. pp. 707—708.

(*r*) See also "Partnership," p. 330.

(*s*) 8 R. 319.

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of land held as partnership property.

appears, be treated as between the partners (including the representatives of a deceased partner), and also as between the heirs of a deceased partner and his executors or administrators, as personal or moveable and not real or heritable estate.

"Partnership," pp. 343 *et seq.*

Conversion of land.

The English decisions upon this point although somewhat conflicting, had established the doctrine adopted by the legislature in this section (*t*).

The rule was founded upon the equitable doctrine of conversion, based upon the right of each partner to have the partnership property sold on the dissolution of the partnership, and the proceeds of sale divided amongst the partners after discharging all the debts and liabilities of the partnership (*u*). If, therefore, there is no right to a sale, there will, it is conceived, be a contrary intention within the meaning of the section (*x*).

The section applies to all land which is partnership property by whatever means it became so, and therefore leaves no room for the distinction at one time drawn (*y*) between lands purchased out of the partnership assets and lands which became partnership property by other means. The section only applies to land which is partnership property and has no application to land held by partners as co-owners and not as partners (*z*).

Probate and legacy duty are payable in respect of a share in a partnership the assets of which consist of land (*a*).

An agreement to assign a share in a partnership, part of the assets of which consists of land, is within § 4 of the Statute of Frauds (*b*).

A partner's share in the land of the partnership is within the Mortmain and Charitable Uses Act (*c*).

As to the right to vote on the election of members of parliament in respect of land belonging to a partnership, see "Partnership," p. 348.

Scotch Law.

Scotch Law. Conversion to moveable estate.

This is the existing law. Professor Bell traces the peculiarity to the *pro indiviso* right vested in the partners for behoof of creditors in the first place

(*t*) See the cases collected and examined in "Partnership," pp. 343 *et seq.*

(*u*) See *A.-G.* v. *Hubbuck* (1884), 13 Q. B. Div. p. 289; *Darby* v. *Darby* (1856), 3 Drew, 495; *Re Hulton*, W. N. 1890, p. 14.

(*x*) *Steward* v. *Blakeway* (1869), 4 Ch. 603, and 6 Eq. 479, and the remarks of Bowen, L.J., in *A.-G.* v. *Hubbuck* (1884), 13 Q. B. Div. p. 289.

(*y*) See *Cookson* v. *Cookson* (1837), 8 Sim. 529.

(*z*) See *Rowley* v. *Adams* (1844), 7 Beav. 548; *Steward* v. *Blakeway* (1869), 4 Ch. 603, and 6 Eq. 479.

(*a*) *A.-G.* v. *Hubbuck* (1884), 13 Q. B. Div. 275; *Forbes* v. *Steven* (1870), 10 Eq. 178.

(*b*) *Gray* v. *Smith* (1889), 43 Ch. D. 208. This question was not argued in the Court of Appeal.

(*c*) *Ashworth* v. *Munn* (1878), 15 Ch. D. 363, decided under the re-

and of partners afterwards, the beneficial interest under this *quasi* trust being a *jus crediti* (*d*). The rule has been long recognised in Scotland: *Corse* v. *Corse* (*e*), *Murray* (*f*), *Kirkpatrick* v. *Sime* (1811) (*g*), *Minto* v. *Kirkpatrick* (1833) (*h*), *Irvine* (1851) (*i*).

Procedure against partnership property for a partner's separate judgment debt.

23.—(1.) After the commencement of this Act a writ of execution shall not issue against any partnership property except on a judgment against the firm.

(2.) The High Court, or a judge thereof, or the Chancery Court of the county palatine of Lancaster, or a county court, may, on the application by summons of any judgment creditor of a partner, make an order charging that partner's interest in the partnership property and profits with payment of the amount of the judgment debt and interest thereon, and may by the same or a subsequent order appoint a receiver of that partner's share of profits (whether already declared or accruing), and of any other money which may be coming to him in respect of the partnership, and direct all accounts and inquiries, and give all other orders and directions which might have been directed or given if the charge had been made in favour of the judgment creditor by the partner, or which the circumstances of the case may require.

(3.) The other partner or partners shall be at liberty at any time to redeem the interest charged, or in case of a sale being directed, to purchase the same.

(4.) This section shall apply in the case of a cost-book company as if the company were a partnership within the meaning of this Act.

(5.) This section shall not apply to Scotland.

This section is new and is intended to do away with the hardship and inconvenience previously caused by partnership property being taken in execution for a partner's separate debt, and to substitute a procedure, by which a complete and equitable settlement of the rights of all parties, may be effected (*k*).

pealed Act, 9 Geo. II. c. 36. The present Act, 51 & 52 Vict. c. 42, is the same is this respect.

(*d*) 2 Bell's Com. 501.

(*e*) 10th Dec. 1802, F. C.

(*f*) 5th Feb. 1805, F. C.

(*g*) 5 Paton's App. 525.

(*h*) 11 S. 632.

(*i*) 13 D. 1367.

(*k*) See *ante*, p. 2, and generally as to the previous law, "Partnership," pp. 356 *et seq.*

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SUB-SECTION 1.

Sub-section (1).

After the commencement of this Act.—I.e. 1st January, 1891, see § 49.

A writ of execution.—The Act contains no definition of a writ of execution, but the term when used in the rules of the Supreme Court includes writs of *fieri facias, capias, elegit,* sequestration and attachment and all subsequent writs that may issue for giving effect thereto (*l*).

Partnership property.—See *ante,* § 20.

SUB-SECTION 2.

Sub-section (2).

Sub-section 2 should be compared with 1 & 2 Vict. c. 110, § 14, which enables a judgment creditor to obtain a charging order upon any shares in a public company in England belonging to his judgment debtor (*m*).

Chancery Court of the County Palatine of Lancaster.—See now 53 & 54 Vict. c. 23.

On the application by summons.—No directions are given in this act as to the procedure to be adopted, but probably R. S. C. Order XLVI. will apply. Under 1 & 2 Vict. c. 110, §§ 14 and 15, an order *nisi* charging the shares of the judgment debtor is obtained *ex parte,* and the order is served upon the company, whose shares are charged, and upon the judgment debtor or his solicitor. The application for the order absolute is made to a judge in chambers (*n*).

Extent of charge.

Charging that partner's interest in the partnership property and profits.—The Act contains no definition of a partner's interest in the partnership property. The bill in its original form defined a partner's share in the partnership property at any time as the proportion of the then existing partnership assets to which he would be entitled if the whole were realised and converted into money and after all the then existing debts and liabilities of the firm had been discharged. This definition, though now omitted, seems to be in accordance with the law (*o*).

An order under this section will charge the whole of the partner's interest, whereas formerly the sheriff under a *fi. fa.* could only sell the share and interest of the execution debtor in such of the chattels of the partnership as were seizable under such a writ (*p*).

Accounts and inquiries.

Direct all accounts and inquiries, &c.—It would seem that these words will not entitle a judgment creditor to any account of the partnership transactions, so long as his judgment debtor remains a member of the firm, except perhaps where by agreement between the partners a partner may give this right to his assignees. See *infra,* § 31.

Though it seems to follow from this section that a judgment creditor who has obtained a charging order will be entitled to an order for the sale of his judgment debtor's interest in the partnership (see sub-section 3 of the

(*l*) R. S. C. Order XLII. r. 8.

(*m*) See "Lindley on the Law of Companies," p. 460, and "Annual Practice," Order XLVI. r. 1 and notes.

(*n*) "Annual Practice," Order XLVI. r. 1, and "Daniell's Chancery Practice," pp. 934—941.

(*o*) See "Partnership," p. 339.

(*p*) *Helmore* v. *Smith* (1886), 35 Ch. Div. 436.

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section) there may be a question whether he is entitled to a decree of foreclosure against his judgment debtor; the balance of authority appears to be in favour of such a right (*q*). Assuming the judgment creditor to be entitled to such an order, the Court will probably have power under this section to make an order for the foreclosure or sale without an independent action being commenced for that purpose (*r*).

Extent of rights under charging order.

A charging order under this section will not confer upon the judgment creditor any greater right than the debtor could honestly give him (*s*) and therefore it will not give him priority over a person to whom the partner has assigned his interest subsequently to the judgment and previously to the charging order (*t*).

If a charging order is made under this section, the partners of the judgment debtor have the right to dissolve the partnership. See *infra*, § 33 (2).

SUB-SECTION 3.

Sub-section (3).

Sub-section 3, while giving the partners of a judgment debtor against whom a charging order has been made under this section the right to redeem the charge, does not in terms give the judgment creditor the right to a decree of foreclosure against such partners; and *quære*, whether such a right is consistent with a right to redeem at any time?

SUB-SECTION 4.

Sub-section (4).

Sub-section 4 removes any difficulty arising from the doubt whether cost-book companies were or were not public companies within the meaning of 1 & 2 Vict. c. 110, § 14 (*u*).

SUB-SECTION 5.

Scotch Law.

Scotch Law. Sub-section 5. Partner's interest attachable by arrestment.

By the common law of Scotland, and as a consequence of the separate *persona* of the firm, the interest of a partner in the concern is attachable by his creditors. Professor Bell says: "Another consequence" (of the separate *persona* of the firm) "is that the creditors of a partner, if they want to attach his share, must arrest in the hands of the company as a separate person" (*x*). Again, "The share of each partner is a portion of

(*q*) See cases decided under 1 & 2 Vict. c. 110, § 13, in favour of the right, *Ford* v. *Wastell* (1847), 6 Hare 229, and 2 Ph. 591; *Jones* v. *Bailey* (1853), 17 Beav. 582; *Messer* v. *Boyle* (1856), 21 Beav. 559; *Beckett* v. *Buckley* (1874), 17 Eq. 435, and against the right, *Footner* v. *Sturgis* (1852), 5 De G. & Sm. 736.

(*r*) Compare *Leggott* v. *Western* (1884), 12 Q. B. D. 287.

(*s*) *Re Onslow's Trusts* (1875), 20 Eq. 677; *Gill* v. *Continental Gas Co.* (1872), L. R. 7 Ex. 332: cases decided under 1 & 2 Vict. c. 110.

(*t*) *Scott* v. *Lord Hastings* (1858), 4 K. & J. 633; *Brearcliff* v. *Dorrington* (1850), 4 De G. & Sm. 122, cases decided under 1 & 2 Vict. c. 110.

(*u*) See "Lindley on the Law of Companies," p. 463.

(*x*) 2 Bell's Com. 508.

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the *universitas*: it forms a debt or demand against the company, so as to be arrestable in the hands of the company" (*y*). The interest of a partner which is so attachable is his proportionate share of the partnership assets, after paying partnership debts. In the recent case of *Parnell* v. *Walter* (1889) (*z*), Lord Kinnear explains that the law of England, as proved to him, was precisely the same as the law of Scotland, and that it followed as a necessary consequence that particular debts due to the firm could not be taken in execution by the creditor of a partner for a private debt; but, he added, "it is not, in my opinion, because of the mere impersonation of the firm that its assets cannot be arrested by the creditors of a partner, but because the partner has no separate share in the assets which is capable of being attached by that diligence. The principle is that a partner has no right to claim any particular portion of the assets as belonging exclusively to him; and neither his assignees nor his separate creditors can have any higher right against the joint property than the debtor or cedent from whom they derive their interest. The true ground, therefore, is that which is stated in Lord Pitfour's note, quoted by Mr. Bell, when he says that the creditors of the partner can only affect his share of the balance after payment of the co-partnery debts" (*a*).

The diligence for attaching the partner's interest is arrestment, not poinding, for the partnership assets are in the hands of the firm, or of the partners on its behalf (*b*); and not adjudication, for it is moveable not heritable in character: *Rae* v. *Neilson* (1742) (*c*); *Neilson* v. *Rae* (1745) (*d*). The arrestment attaches the partner's interest while the firm subsists, but requires to be made effectual by an action of furthcoming, which cannot be raised till the dissolution of the partnership (*e*). In the case of *Rae* (*supra*), it was observed on the bench that an arrestment could not carry a right of partnership to any other effect than to pursue a division and the arresting creditor was not entitled to name a partner in place of his debtor. This is obvious (*f*). The debtor remains a partner, and if a definite term be fixed by the contract, the creditor seems to have no means of forcing an earlier dissolution; but the creditors will through him reap the whole accruing benefits during the subsistence of the partnership, and the other partners cannot object: *per* Lord Gifford in *Cassells* v. *Stewart* (1879) (*g*). If it be a partnership at will, can the creditor compel his debtor to dissolve, or exercise the power himself? or can the power be adjudged from his debtor, and put in exercise? These questions have not been solved in the law of Scotland, probably either because special stipulations in the contract of copartnery usually provide for the retirement of insolvent partners, or the inconveniences of a continuing arrestment have been found potent enough to compel a settlement.

(*y*) 2 Bell's Com. 536.
(*z*) 16 R. 917.
(*a*) 16 R. 925.
(*b*) Erskine III., 3, 24.
(*c*) M. 716.
(*d*) M. 723.
(*e*) Erskine, *supra*.
(*f*) Bell's Pr. § 358.
(*g*) 6 R. 936, 956.

Section 24.

Rules as to interests and duties of partners subject to special agreement.

24. The interests of partners in the partnership property and their rights and duties in relation to the partnership shall be determined, subject to any agreement express or implied between the partners, by the following rules:

(1.) All the partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses whether of capital or otherwise sustained by the firm. (See *infra*, p. 62.)

(2.) The firm must indemnify every partner in respect of payments made and personal liabilities incurred by him—

(*a.*) In the ordinary and proper conduct of the business of the firm; or

(*b.*) In or about anything necessarily done for the preservation of the business or property of the firm. (See *infra*, p. 64.)

(3.) A partner making, for the purpose of the partnership, any actual payment or advance beyond the amount of capital which he has agreed to subscribe, is entitled to interest at the rate of five per cent. per annum from the date of the payment or advance. (See *infra*, p. 65.)

(4.) A partner is not entitled, before the ascertainment of profits, to interest on the capital subscribed by him. (See *infra*, p. 66.)

(5.) Every partner may take part in the management of the partnership business. (See *infra*, p. 66.)

(6.) No partner shall be entitled to remuneration for acting in the partnership business. (See *infra*, p. 66.)

(7.) No person may be introduced as a partner without the consent of all existing partners. (See *infra*, p. 67.)

(8.) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners, but no change may be made in the nature of the partnership business without the consent of all existing partners. (See *infra*, p. 68.)

(9.) The partnership books are to be kept at the place of

Section 24.

business of the partnership (or the principal place, if there is more than one), and every partner may, when he thinks fit, have access to and inspect and copy any of them. (See *infra*, p. 69.)

Partnership Property, see §§ 20 and 21.

SUB-SECTION 1.

Sub-section (1). Shares of partners in partnership.

"Partnership," p. 348.

If it be proved that the partners contributed the capital of the partnership in unequal shares it is presumed that, in the absence of an agreement to the contrary, on a final settlement of accounts, the capital of the business remaining after the payment of outside debts and liabilities, and of what is due to each partner for advances, will, subject to all proper deductions, be divided amongst the partners in the proportions in which they contributed it and not equally (*h*). But although the partners may have contributed the capital unequally they will, in the absence of any agreement, share profits and losses, whether of capital or otherwise, equally (*i*).

If it has been agreed that profits shall be divided in a certain proportion the inference, in the absence of an agreement to the contrary, is that losses are to be shared in the same proportion (*k*).

In the absence of any agreement, the partners will have to share the losses equally, even though the loss may have been due to the conduct of one partner more than another, provided he is acting *bonâ fide* and without culpable negligence (*l*). But where a loss has been incurred by the fraud, culpable negligence, or wilful default of one partner, hitherto the other partners have been entitled to throw the whole of such loss upon the partner in default (*m*), unless they have treated the loss as a partnership loss (*n*); and it is conceived that this sub-section has in no way deprived them of this right.

The rule contained in this sub-section applies to partnerships for a single transaction (*o*).

Where a firm, say of two persons, enters into a partnership transaction with a person who is not a member of the firm, if the two partners entered into the speculation as a firm the profits and losses will be divided equally

(*h*) See *infra*, § 44 (*b*), 1, 2, and 3.

(*i*) *Stewart* v. *Forbes* (1849), 1 Mac. & G. 137; *Webster* v. *Bray* (1849), 7 Ha. 159; *Robinson* v. *Anderson* (1855), 20 Beav. 98, and 7 De G. M. & G. 239; *Peacock* v. *Peacock* (1809), 16 Vesey 49, and other cases cited "Partnership," pp. 348 *et seq.*

(*k*) See per Jessel, M.R., in *Albion Life Assurance Society* (1880), 16 Ch. Div. p. 87, and *infra*, § 44 (*a*).

(*l*) *Ex parte Letts and Steer*, 26 L. J. Ch. 455.

(*m*) *Thomas* v. *Atherton* (1878), 10 Ch. Div. 85, and "Partnership," pp. 386 *et seq.*

(*n*) *Cragg* v. *Ford* (1842), 1 Y. & C. C. C. 280.

(*o*) See *Robinson* v. *Anderson* (1855), 20 Beav. 98, and 7 De G. M. & G. 239.

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in two parts, but if they entered into it as two individuals the profits and losses will be shared equally between all three (*p*).

Where some partners have retired and the others have taken over their shares, the inference, in the absence of evidence to the contrary, is that the continuing partners took the shares of the retiring members in the proportions in which they, the continuing partners, were originally interested in the business (*q*).

An agreement excluding the application of this sub-section may be inferred from the mode in which the partners have dealt with each other and from the contents of the partnership books (*r*).

Scotch Law.

SCOTCH LAW.

This is the existing law and is in accordance with the House of Lords' decision in *Campbell's Trustees* v. *Thomson* (1829—31) (*s*). In that case the Court of Session held that "according to the law of Scotland the presumption was for equality," and Professor Bell had before stated the doctrine thus:—"The presumption is that in the opinion of the parties their several contributions" (of property, money, skill, or labour) "are equalised, though it may be impossible or difficult to state in what that equality consists" (*t*). The House of Lords (Lords Brougham and Wynford) held the judgment of the Court of Session to mean "that where there is no express contract fixing the rights of the parties, the partnership property and the partnership profits must be equally divided," and that this was an over-ruling presumption of law. It is not quite clear that this is what the Court of Session really meant; for it was there stated that "confessedly there is no evidence as to the extent of the share, and in the absence of evidence it is the duty of the judge to tell the jury that they must find equality, so that a remit to the jury court is superfluous" (*tt*). In somewhat similar terms Lord Brougham stated that the jury would only have recourse to the presumption of equality in the last resort and for want of evidence. Accordingly the House of Lords reversed, and directed the Court of Session to send an issue to the jury court to ascertain, under all the circumstances, what was the fair proportion of the business to which the party was entitled (*u*). Similarly, in a later case of joint adventure in the absence of any circumstances indicating a different proportion the shares were held to be equal: *Fergusson* v. *Graham* (1836) (*x*).

In a prior Scotch case in the House of Lords, *Struthers* v. *Barr* (1826) (*y*), it was held by Lord Gifford, reversing the judgment of the Court of Session,

(*p*) *Warner* v. *Smith* (1863), 1 De G. J. & S. 337.

(*q*) *Robley* v. *Brooke* (1833), 7 Bli. N. S. 90, and see *Copland* v. *Toulmin* (1840), 7 Cl. & Fin. 349.

(*r*) *Stewart* v. *Forbes* (1849), 1 Mac. & G. 137.

(*s*) Ersk. III. 3, 19; 7 S. 650, 5 W. & S. 16; Bell's Prin. § 362.

(*t*) 2 Bell's Com. 503.

(*tt*) 7 S. 653.

(*u*) See also *Aberdeen Bank* v. *Clark* (1859), 22 D. 44.

(*x*) 14 S. 871.

(*y*) 2 W. & S. 153.

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that the extent of a partner's interest, where not fixed by contract, was not to be regulated by the amount of his input capital, as compared with that of the other partners, but that he was to be held as having an equal share, and to be liable for losses in the same proportion. There was no written contract, and the case was stated to be one merely of evidence, Lord Gifford holding that it appeared evident that at the outset the respondent was to have an equal share, each to contribute one-third of the capital, though he actually contributed less than one-third, and less than the other partners did.

Under this sub-section it is thought that the amount of input capital, though an important element, will not be conclusive. If there be no other circumstances to throw light (a case not very likely to occur), it may determine the proportion; but, as was observed by Lord President Hope in *Campbell's Trustees* v. *Thomson*, which was a professional partnership, "it is immaterial that no capital was contributed, because a person's mind and exertions may be more valuable than capital." And Mr. Erskine says, "the skill or industry of one partner may be worth the stock of another" (*z*).

SUB-SECTION 2.

Sub-section (2) (*a*).

"Partnership," pp. 368 *et seq.*

Sub-section (2) (*a*) is in accordance with the previous law.

Right of indemnity.

Since every partner is an agent of the other partners for the purpose of carrying on the partnership business in the usual way (see *supra*, § 5), it follows from the ordinary rules of principal and agent that he is entitled to be indemnified against all loss incurred by him while so doing (*a*), unless it has been incurred by his own fraud, culpable negligence, or wilful default (*b*).

Sub-section (2) (*b*).

The second half of sub-section 2 is also in accordance with the previous law (*c*). The right to indemnity in this case rests on a different basis to the right under the former clause of this sub-section. For a partner is not the agent of a firm for doing any act, however urgent it may be, unless such act is done in carrying on the partnership business in the usual way (see *supra*, § 5, and notes). The right to indemnity in these cases arises *quasi ex contractu*; analogous rights are found in cases of salvage and average (*d*).

There will be no right of indemnity for any payments which are inconsistent with the agreement between the partners (*e*). And it is quite open to partners to agree that, as between themselves, they shall not be liable

(*z*) 7 S. 652; Ersk. III. 3, 19.

(*a*) See "Partnership," pp. 369 *et seq.*

(*b*) See *ante*, p. 62, note (*m*).

(*c*) *Ex parte Chippendale* (1854), 4 De G. M. & G. 19, and "Partnership," p. 383.

(*d*) See Sir Frederick Pollock's "Digest of the Law of Partnership," 5th ed. p. 72.

(*e*) *Thornton* v. *Procter*, 1 Anst. 94, and "Partnership," p. 383.

beyond a certain sum, and in such a case no partner can enforce contribution or indemnity beyond that amount (*f*). They may even by agreement entirely exclude the right to indemnity (*g*). Section 24.

Scotch Law.

This is the existing law, and arises from each partner being liable to the debts of the company, and entitled, under the general or implied mandate, to bind the company within the lines of its business. But where the actings are illegal, *e.g.*, contravention of Truck or Revenue statutes, the company is not liable to indemnify the partner, and an innocent partner forced to pay a penalty is entitled to relief against the guilty ones: *Finlayson* v. *Braidbar Co.* (1864) (*h*); *Campbell* (1834) (*i*). Nor can any action be maintained by one partner against another for loss, remuneration, or accounting in connection with an illegal enterprise: *Gibson* v. *Stewart* (1835) (*k*). Scotch Law.

SUB-SECTION 3.

"Partnership," p. 390. Sub-section (3).

Sub-section (3) is in accordance with the previous law (*l*). Right to interest on advances.

It does not appear to be necessary in order to give the partner making the advance a right to interest that his co-partner should be aware of the transaction (*m*); but the advance must be of such a nature that the partner making it has a right to be indemnified by the firm (*n*).

If the firm carries on a business in which it is customary to pay a higher rate of interest than 5 per cent., or if a higher rate has been allowed in the books of the particular partnership, there will be an implied agreement to pay such higher rate, which will exclude this sub-section (*o*).

A partner indebted to the firm in respect of money borrowed or in respect of a balance in his hand is not liable for interest, unless there has been a fraudulent retention or an improper application of the money (*p*).

See also *infra*, § 29.

Scotch Law.

Professor Bell points out that the liability between the firm and individual partners, in respect of advances beyond the contribution of partnership stock, rests on the relation or principle of debtor and creditor; but a partner is barred from competing against the firm's creditors (*q*). The advance is a loan, and money lent bears interest even though not stipulated for, "unless from the circumstances of the case there is ground in equity Scotch Law.

(*f*) *Worcester Corn Exchange* (1853), 3 De G. M. & G. 180.

(*g*) *Ex parte Chippendale* (1854), 4 De G. M. & G. 52.

(*h*) 2 Mc. 1297.

(*i*) 12 S. 573.

(*k*) 14 S. 166; 1 Robin. App. 260.

(*l*) See *Ex parte Chippendale* (1854), 4 De M. & G. 36.

(*m*) See case in last note.

(*n*) See ib. and § 24 (2).

(*o*) See "Partnership," p. 390, and commencement of this section.

(*p*) *Rhodes* v. *Rhodes* (1860), Johns. 653, and 6 Jur. N. S. 600; and other cases cited, "Partnership," p. 391.

(*q*) 2 Bell's Com. 507 and 536.

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to hold that interest was not meant to be demanded" (*r*): *Cuninghame* v. *Boswell* (1868) (*s*). Five per cent. is legal interest, and is due in the absence of special stipulation. This sub-section, however, removes any doubt as to liability for interest, and fixes the rate. A contribution of capital in money, due at a specified date and in arrear, will likewise bear interest at 5 per cent. from the due date, unless otherwise stipulated. In *Ballandene* v. *Glasgow Union Bank* (1839) (*t*), it was so stipulated and enforced.

SUB-SECTION 4.

Sub-section (4). Interest on capital.

"Partnership," p. 389.

Sub-section (4) is in accordance with the decision of *Cooke* v. *Benbow* (1865) (*u*), but like the other sub-sections of this section it only applies in the absence of any agreement between the partners.

Scotch Law.

SCOTCH LAW.

This is the existing law, but is often the subject of stipulation to the contrary.

SUB-SECTION 5.

Sub-section (5). Right of management.

"Partnership," p. 301.

The rule contained in sub-section (5) has long been recognised. Even if one partner has mortgaged all his share and interest in the partnership to his co-partner, the latter will not be permitted during the continuance of the partnership to avail himself of his rights as a mortgagee, to exclude the former from interference in the partnership (*x*).

Not only may every partner take part in the management of the partnership business, but, in the absence of any agreement to the contrary, it is the duty of every partner to attend diligently to the business.

Scotch Law.

SCOTCH LAW.

This is the existing law. The right to take part in the management flows from the mandate in the firm's affairs which is implied in partnership. Hence payment to a partner is payment to the firm: *Nicoll* v. *Reid* (1878) (*y*). The right may be excluded by contract. It would not be excluded by an arrestment or assignation of a partner's interest in the concern. See *infra*, § 31.

SUB-SECTION 6.

Sub-section (6).

"Partnership," p. 380.

It is conceived that sub-section (6), which is in accordance with the

(*r*) 1 Bell's Com. 692.
(*s*) 6 Mc. 890.
(*t*) 1 D. 1170; 1 Bell's Com. 691.
(*u*) 3 De G. J. & Sm. 1; "Partnership," p. 389.
(*x*) *Rowe* v. *Wood* (1822), 2 J. & W. 558; "Partnership," p. 301.
(*y*) 6 R. 217.

Section 24.

Remuneration for extra work.

previous law, will not prevent a partner from obtaining compensation for extra work and trouble imposed upon him by his co-partner wilfully neglecting to attend to the partnership business (*a*).

Where a partner has died or retired, and his co-partners have continued the business without any final settlement of accounts between the firm and the outgoing partner or his estate, the continuing partners are, in the absence of special reasons to the contrary, allowed some remuneration for their trouble (*b*).

Scotch Law.

Scotch Law.

"This is one of the plain and obvious principles of the law of partnership:" per Lord Justice Clerk (Inglis) in *Pender* v. *Henderson*, (1864) (*c*). Any claim to remuneration must be rested on specified grounds of express or implied agreement, and such agreement cannot be inferred from the mere circumstance of one partner having taken the sole management: per Lord Barcaple in *Faulds* v. *Roxburgh* (1867) (*d*); *McWhirter* v. *Guthrie* (1821) (*e*). The same applies to joint adventure: *Campbell* v. *Beath* (1826) (*f*). But where services were given by one of four joint lessees of a farm under the erroneous belief that he had right to the farm, a claim for remuneration was sustained: *Anderson* (1869) (*g*).

SUB-SECTION 7.

Sub-section (7).

"Partnership," pp. 363 *et seq.*

Sub-section (7) states a proposition which has long been recognised as one of the fundamental principles of partnership law.

Introduction of new partner.

The consent to the introduction of a new partner may be given prospectively; as observed in *Lovegrove* v. *Nelson* (1834) (*i*). "To make a person a partner with two others their consent must clearly be had, but there is no particular mode or time required for giving that consent; and if three enter into a partnership by a contract which provides that on one retiring, one of the remaining two, or even a fourth person who is no partner at all, shall name the successor to take the share of the one retiring, it is clear that this would be a valid contract which the Court must perform, and that the new partner would come in as entirely by the consent of the other two as if they had adopted him by name."

As to the effect of the assignment by a partner of his share in the partnership, see *infra*, § 31.

As to the apparent exception in the cases of mining partnerships and partnerships in ships, see "Partnership," p. 366.

(*a*) *Airey* v. *Borham* (1861), 29 Beav. 620.

(*b*) See "Partnership," p. 381, and p. 524 *et seq.*; and *infra*, § 42 (1).

(*c*) 2 Mc. 1428 (1438).

(*d*) 5 Mc. 373 (375).

(*e*) H. 760.

(*f*) 2 W. & S. 25.

(*g*) 8 Mc. 157.

(*i*) 3 M. & K. 20.

Section 24.

Scotch Law.

SCOTCH LAW

This is the existing law, and flows from "the *delectus personæ* implied in the nature of the contract," which "bars the admission of new partners either by succession or alienation" (*k*). But the parties may stipulate that their heirs and even their assignees shall be adopted in their room (*l*); a curious illustration of which is the case of *Warner* v. *Cuninghame* (1815) (*m*), where two partners granted to themselves and their heirs and assignees mutual leases of coal and salt works on their respective estates for 124 years, which were held by the House of Lords binding on the heirs taking up the succession. A share in a partnership destined to heirs goes to the heir in *mobilibus: Irvine* (1851) (*n*). In *Hill* v. *Wylie* (1865) (*o*), and *Beveridge* (1872) (*p*), the partnership was continued between the surviving partners and the representatives or testamentary trustees of the deceased, the latter collectively constituting one partner.

SUB-SECTION 8.

Sub-section (8).

"Partnership," pp. 313 *et seq.*

Rights of majority.

The first part of sub-section (8) adopts what was stated as probably the law in "Partnership," p. 314, though, as there pointed out, there does not appear to have been any clear and distinct authority on the point.

If there is no provision in the partnership articles on the point in dispute and the partners are equally divided, those who forbid a change must prevail; *in re communi potior est conditio prohibentis* (*q*).

In order that the decision of the majority may bind the minority, the majority must be constituted and act in perfect good faith, and every partner has a right to be consulted, to express his own views, and to have those views considered by his co-partners (*r*).

The rule that no change may be made in the nature of the partnership business without the consent of all the partners was laid down and acted on by Lord Eldon in *Natusch* v. *Irving* (*s*) and *Const* v. *Harris* (1824) (*t*), and these cases have since been frequently followed. The difficulty in such cases is in the application of the rule to the facts in each case; instances of its application will be found in "Lindley on the Law of Companies," p. 320.

Scotch Law.

SCOTCH LAW.

The right of a majority in number of the partners has hitherto been assumed; but by contract it is frequently stipulated that the votes shall be

(*k*) 2 Bell's Com. 509, 520.
(*l*) *Ibid.*
(*m*) 3 Dow. 76.
(*n*) 13 D. 1367.
(*o*) 3 Mc. 541.
(*p*) L. R. 2 Sc. App. 183.
(*q*) See "Partnership," p. 314, and cases there cited.
(*r*) See *Const* v. *Harris* (1824), Turn. & R. 525; and other cases quoted, "Partnership," p. 315.
(*s*) Gow on "Partnership," App. p. 398, ed. 3, and "Partnership," pp. 316—317.
(*t*) Turn. & R. 525.

in proportion to the partner's interest in the concern. Mr. Clark (*u*) states some rules in reference to the powers of majorities, but there is no direct authority by decision. Compare *Wyse* v. *Abbot* (1881) (*x*) as to trustees duty of consultation in trust affairs. Sections 24—25.

SUB-SECTION 9.

"Partnership," pp. 404 and 421. Sub-section (9).

Sub-section (9) states the previous law on this subject, but like the other sub-sections of this section, it is subject to any agreement between the partners. Partnership books.

As to the duty of keeping accounts, see *infra*, § 28.

Scotch Law.

The place where the business books of the partnership are kept is an important element in determining the seat or centre of the business, and thereby the domicile of the firm: *per* Lord Shand, in *Lord Advocate* v. *Laidlay's Trustees* (1889) (*z*). Under the existing law "it is the privilege of each of the partners, unless they are excluded by the contract, to see the whole books at all times;" but "it is not the privilege of a partner to introduce a stranger to examine the books": *per* Lord Colonsay, in *Cameron* v. *McMurray* (1855) (*a*). But when the partners are engaged in a litigation with each other, they are entitled to professional assistance in the inspection (*b*). The exclusion will not hold in a charge of fraud against partners: see *Collins* (1850) (*c*). SCOTCH LAW.

25. No majority of the partners can expel any partner unless a power to do so has been conferred by express agreement between the partners. Expulsion of partner.

"Partnership," pp. 426 and 574.

It should be noticed that the power of expulsion must be conferred by express agreement, and this is in accordance with the decision in *Clarke* v. *Hart* (1858) (*d*).

Powers of expulsion are "*strictissimi juris*," and "parties who seek to enforce them must exactly pursue all that is necessary in order to enable them to exercise this strong power" (*e*). They must also be exercised in good faith,

(*u*) Clark on Partnership, pp. 186 *et seq.*
(*x*) 8 R. 983.
(*z*) 16 R. 959, 974; revd. 17 R. (H. L.).
(*a*) 17 D. 1142.
(*b*) *Ibid.*
(*c*) 13 D. 349.
(*d*) 6 H. L. C. 633.
(*e*) Per Lord Chelmsford in *Clarke* v. *Hart* (1858), 6 H. L. C. 650. See also *Blisset* v. *Daniel* (1853), 10 Ha. 493.

Sections 25—26.

Expulsion of partner.

and the partner, whom his co-partners seek to expel, must have a full opportunity of explaining his conduct (*f*).

An attempt to expel a partner which fails, owing to the absence of a power of expulsion or the irregular exercise of such a power, is void, and the partner whose expulsion was attempted, never having ceased to be a partner, can recover no damages for the ineffectual attempt to expel him (*g*).

A power to determine the partnership, if the business should not be conducted or the results not be to the satisfaction of one of the partners, must be distinguished from a power to expel. In such a case, as Jessel, M.R., pointed out, "you give the power to a single partner in terms which show that he is to be the sole judge for himself, not to acquire a benefit but to dissolve the partnership, and in such a case he may exercise the discretion capriciously and there is no obligation upon him to act as a tribunal or state the grounds on which he decides" (*h*).

It may be a question how far an express power to expel a partner without giving any reasons for such expulsion and without hearing him would be upheld by the Court (*i*).

Scotch Law.

Scotch Law.

This is in accordance with existing law. Clauses providing for expulsion of a partner are *strictissimi juris: Munro* v. *Cowan*, 1813 (*k*). See case of a power to repone a partner who had agreed to go out: *Tennent* v. *Tennent's Trustees* (1868-70), 6 Mc. 840; 8 Mc. (H. L.), 10.

Retirement from partnership at will.

26.—(1.) Where no fixed term has been agreed upon for the duration of the partnership, any partner may determine the partnership at any time on giving notice of his intention so to do to all the other partners.

(2.) Where the partnership has originally been constituted by deed, a notice in writing, signed by the partner giving it, shall be sufficient for this purpose.

SUB-SECTION 1.

Sub-section (1).

"Partnership," pp. 571 *et seq.*

The first part of this section is in accordance with the previous law.

The notice of dissolution must be explicit (*m*), but may be prospective (*n*).

(*f*) *Wood* v. *Woad* (1874), L. R. 9 Ex. 190; *Labouchere* v. *Wharncliffe* (1879), 13 Ch. D. 346; *Steuart* v. *Gladstone* (1879), 10 Ch. Div. 626. See "Partnership," pp. 426 *et seq.*

(*g*) *Wood* v. *Woad* (1874), L. R. 9 Ex. 190. Compare *New Chile Gold Mining Co.* (1890), 45 Ch. D. 598.

(*h*) *Russell* v. *Russell* (1880), 14 Ch. D. at p. 480. Compare *Blissett* v. *Daniel* (1853), 10 Ha. 493.

(*i*) See Sir Frederick Pollock's "Digest of the Law of Partnership," 5th ed. p. 76.

(*k*) 8 June, F. C.

(*m*) *Van Sandau* v. *Moore* (1826), 1 Russ. 463.

(*n*) *Mellersh* v. *Keen* (1859), 27 Beav. 236.

If once given it cannot be withdrawn without the consent of all the partners, even though one of them be a lunatic (*o*). Section 26.

A notice will be effectual though one of the partners is a lunatic, but in such a case the dissolution cannot be carried out without having recourse to an action (*p*).

Scotch Law.

This is the settled rule in partnerships at will: *Marshall* v. *Marshall* (*q*). The notice does not require to be "reasonable," per Sir Wm. Grant, M.R., in *Featherstonhaugh* v. *Fenwick* (*r*), notwithstanding Erskine's *dictum* that a partner shall not renounce from unfair or interested views (*s*). Professor Bell observes that "although in such cases the dissolution cannot be prevented, the beneficial effects of it will be communicated to the partnership; the acquisition will be held as partnership property at the time of the dissolution" (*t*): *McNiven* v. *Peffers* (1868) (*u*). Scotch Law.

SUB-SECTION 2.

"Partnership," pp. 572 *et seq.*

Sub-section (2) settles a point which has long been considered doubtful (*x*). It will be observed that this sub-section says that a notice in writing signed by the partner giving it shall be sufficient, and not that such a notice shall be necessary. It would, however, be prudent in all cases to give such a notice as is here mentioned. As to the date of the dissolution, see *infra*, § 32; and the effect thereof, see *infra*, § 38. Sub-section (2).

The act does not deal with the right of a partner to retire, as distinguished from his right to dissolve the firm (see *ante*, p. 6); as to this it may be said— Right to retire.

1. That it is competent for a partner to retire with the consent of his co-partners at any time and upon any terms (*y*).

2. That it is competent for him to retire without their consent by dissolving the firm, if he is in a position to dissolve it; as to this see *infra*, §§ 32 and 35.

3. That it is not competent for a partner to retire from a partnership which he cannot dissolve, and from which his co-partners are not willing that he should retire (*z*).

As to the liabilities of a partner who has retired, see *supra*, § 17, and *infra*, § 36.

Scotch Law.

It is not said that notice must be in writing. The ordinary rule of evidence is not displaced *unumquodque eodem modo dissolvitur quo colli-* Scotch Law.

(*o*) *Jones* v. *Lloyd* (1874), 18 Eq. 265.

(*p*) *Mellersh* v. *Keen* (1859), 27 Beav. 236.

(*q*) 10th Jan. 1815, and 23rd Feb. 1816, F. C.; 2 Bell's Com. 520 *et seq.*

(*r*) 17 Vesey, 298.

(*s*) III. 3, 26.

(*t*) 2 Bell's Com. 522.

(*u*) 7 Mc. 181.

(*x*) "Partnership," p. 572.

(*y*) As to agreements giving a right to retire, see "Partnership," pp. 422 *et seq.*

(*z*) "Partnership," pp. 573—674.

Section 27.

gatur (*zz*). The notice should be in writing. But in the case of verbal constitution verbal notice of dissolution would, it is thought, suffice.

Where partnership for term is continued over, continuance on old terms presumed.

27.—(1.) Where a partnership entered into for a fixed term is continued after the term has expired, and without any express new agreement, the rights and duties of the partners remain the same as they were at the expiration of the term, so far as is consistent with the incidents of a partnership at will.

(2.) A continuance of the business by the partners or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is presumed to be a continuance of the partnership.

"Partnership," p. 410.

Continuance of business after expiration of term.

This section only applies where the fixed term has expired; but the same rule has been applied where the partnership has been determined by the death of one partner and the business has been continued by the surviving partners without coming to any new agreement (*a*).

SUB-SECTION 1.

Sub-section (1)

The new agreement need not be in writing, and may extend to some only of the former provisions, in which case the former provisions, so far as they are consistent with the new agreement and with a partnership at will, will continue in force.

It is not by any means clear what provisions are, and what are not, consistent with a partnership at will. It has, however, been decided that a right of expulsion cannot be exercised after the expiration of the original term (*b*); and it is clear that any clause which prevents a partner from determining the partnership at his will would be inapplicable (*c*).

An arbitration clause (*d*) and a clause giving a right of pre-emption have been held applicable after the expiration of the original term (*e*).

The fact that the articles of partnership provide for events happening *during the term* or *during the partnership* will not prevent the application of the rule (*f*).

(*zz*) Dickson on Evidence (Grierson), §§ 627, 628.

(*a*) *King* v. *Chuck* (1853), 17 Beav. 325, and "Partnership," p. 410.

(*b*) *Clark* v. *Leach* (1863), 32 Beav. 14, and 1 De G. J. & Sm. 409.

(*c*) See § 26, and *Neilson* v. *Mossend Iron Co.* (1886), 11 App. Ca. 298.

(*d*) *Gillett* v. *Thornton* (1875), 19 Eq. 599.

(*e*) *Essex* v. *Essex* (1855), 20 Beav. 442; *Cox* v. *Willoughby* (1880), 13 Ch. D. 863; but see *Cookson* v. *Cookson* (1837), 8 Sim. 529; *Yates* v. *Finn* (1880), 13 Ch. D. 839.

(*f*) See cases in the last note.

Scotch Law.

SCOTCH LAW.

This is the point decided in the Court of Session and House of Lords in *Neilson* v. *Mossend Co.* (1885–86) (*g*), where, however, it was held that a certain stipulation as to dissolution could apply only to the termination of the original contract, and was totally inapplicable to a partnership at will.

SUB-SECTION 2.

Sub-section (2).

For an illustration of this sub-section, see *Parsons* v. *Hayward* (1862) (*h*).

As to the rights of the parties where some only of the original partners continue the business and there is no final settlement of accounts, see *infra*, § 42.

Scotch Law.

SCOTCH LAW.

This is also existing law (*i*) : *Dalgleish* v. *Sorley* (1791) (*k*).

28. Partners are bound to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives.

Duty of partners to render accounts, &c.

"Partnership," p. 404.

The duty of keeping accurate accounts was recognised in *Rowe* v. *Wood* (1822) (*l*), and indeed has never been doubted.

For the manner in which partnership accounts are usually kept, see "Partnership," p. 396.

As to the right of a partner to inspect and take copies of the partnership books, see *supra*, § 24 (9).

The duty is confined to rendering accounts to partners and their legal representatives, and does not extend, during the continuance of the partnership, to the assignees of a partner's share (see *supra*, § 31), nor to persons who have obtained a charge under § 23.

The Act contains no definition of the term legal representative, but it will, it is conceived, include the trustee of a bankrupt partner (*m*).

Scotch Law.

SCOTCH LAW.

Duty to account.

This is the existing law, and has been thus expressed: "The right to share profits and the liability to incur loss consequent on the partnership relation necessarily involve mutual rights of accounting between the company and its partners, and between each partner and his fellows in all matters relating to the partnership" (*n*). It underlies the very common action of accounting raised by the representatives of a deceased partner,

(*g*) 12 R. 499 ; 11 App. Ca. 298.
(*h*) 4 D. F. J. 474.
(*i*) 2 Bell's Com. 522.
(*k*) H. 746.
(*l*) 2 J. & W. 558.
(*m*) *Wilson* v. *Greenwood* (1818), 1 Swanst. 471.
(*n*) Clark, 396 ; see also 2 Bell's Com. 536.

Sections 28—29.

against the remaining partners: *Lawson* v. *Lawson's Trustees* (1872) (*o*). In actions of accounting while the firm is a going concern, the firm should be a party either as pursuer or defender; and when the firm is dissolved, the whole partners or their representatives should be parties: *Bell* v. *Willison* (1822) (*p*). Compare *Beveridge* (1869) (*q*) as to the firm being a party in an action by a partner to determine questions of internal management of the firm. Arresting creditors or assignees of a partner's interest in the firm, not being "legal representatives," do not seem to be within the purview of this section.

Accountability of partners for private profits.

29.—(1.) Every partner must account to the firm for any benefit derived by him without the consent of the other partners from any transaction concerning the partnership, or from any use by him of the partnership property name or business connexion.

(2.) This section applies also to transactions undertaken after a partnership has been dissolved by the death of a partner, and before the affairs thereof have been completely wound up, either by any surviving partner or by the representatives of the deceased partner.

"Partnership," pp. 305 *et seq.*

This section introduces no change into the previous law; the foundation of the rule is the relation of agency which exists between a partner and the firm (see § 5) and the good faith which is required in all transactions between partners (*r*).

This section will include—

Cases in which a partner seeks to derive a profit from some transaction between himself and his firm; as, for instance, by selling his own property to the firm (*s*), or making a secret profit out of the sale of partnership property (*t*).

Cases in which a partner attempts to obtain for himself a benefit which it was his duty to obtain, if at all, for the firm; as, for instance, where a partner obtained for himself a renewal of a lease of the partnership property (*u*), or abatements from incumbrances upon property which he was purchasing for his firm (*x*).

(*o*) 11 Mc. 168.

(*p*) 1 Shaw App. 220; Clark, 397.

(*q*) 7 Mc. 1034.

(*r*) *Cassells* v. *Stewart* (1881), 6 App. Ca. 64.

(*s*) *Bentley* v. *Craven* (1853), 18 Beav. 75.

(*t*) *Dunne* v. *English* (1874), 18 Eq. 524.

(*u*) *Featherstonhaugh* v. *Fenwick* (1810), 17 Ves. 298; *Clegg* v. *Fishwick* (1849), 1 Mac. & G. 294; *Clegg* v. *Edmonson* (1857), 8 De G. M. & G. 787.

(*x*) *Carter* v. *Horne* (1728), 1 Eq. Ab. 7.

Section 29.

Cases in which a partner seeks to obtain a private profit from the use of the partnership property or connection, as in the cases of *Burton* v. *Wookey* (1822) (*y*) and *Gardner* v. *MacCutcheon* (1842) (*z*).

Remedies of principal when his agent receives bribes.

If a person bribes an agent the principal has two distinct causes of action, one against his agent for the bribes he has received, and another against the person who gave the bribes and the agent jointly and severally for any loss he may have suffered by their fraud (*a*). The relation, however, between the principal and his agent as regards such bribes is one of debtor and creditor, and the principal has no right to follow the moneys and treat them as trust moneys (*b*).

Without the consent.—Knowledge on the part of the other partners will not exclude their right unless they consent, though they may lose their remedy by laches and delay (*c*).

Interest.

Where one partner claims a benefit obtained by his co-partner, and succeeds in establishing his claim, the claimant is charged as the price of the relief afforded not only with the amount actually expended by his co-partner in obtaining the benefit, but with interest on that amount at the rate of 5 per cent. per annum (*d*). On the other hand, if one partner has in breach of the good faith due to his co-partners obtained money which he is afterwards compelled to account for to the firm, he will be charged with interest upon the amount at the rate of 4 per cent. (*e*).

Scotch Law.

Scotch Law.

Benefit from partnership transaction.

The doctrine of this section is well settled in the law of Scotland. See Erskine (*f*) and Professor Bell (*g*); also *Marshall* (*h*); *Pender* v. *Henderson* (1864) (*i*); *McNiven* v. *Peffers* (1868) (*k*). The same principle holds in regard to the directors of public companies: *Huntingdon Copper Co.* v. *Henderson* (1877) (*l*); *Scottish Pacific Co.* (1888) (*m*). But a sale or transfer by one partner to another of his interest in the concern is not a benefit or acquisition within the meaning of this section: *Cassells* v. *Stewart* (1879) (*n*).

(*y*) 6 Mad. 367.

(*z*) 4 Beav. 534, and other cases cited, "Partnership," p. 309.

(*a*) *Mayor, &c., of Salford* v. *Lever* (1890), 25 Q. B. D. 363; affd. W. N. (1890), 179.

(*b*) *Lister & Co.* v. *Stubbs* (1890), 45 Ch. Div. 1.

(*c*) *Clegg* v. *Edmonson* (1857), 8 De G. M. & G. 787.

(*d*) *Hart* v. *Clarke* (1854), 6 De G. M. & G. 254; *Perens* v. *Johnson* (1857), 3 Sm. & G. 419, and see § 24 (3).

(*e*) *Fawcett* v. *Whitehouse* (1829), 1 R. & M. 132. In this case the commission was received before the partnership had actually commenced, though after an agreement for partnership had been concluded.

(*f*) III. 3, 20.

(*g*) 2 Com. 522.

(*h*) 20th Jan. 1815, and 23rd Feb. 1816, F. C.

(*i*) 2 Mc. 1428.

(*k*) 7 Mc. 181.

(*l*) 4 R. 294.

(*m*) 15 R. 290.

(*n*) 6 R. 936, affd. 6 App. Ca. 64.

Sections 30—31.

Duty of partner not to compete with firm.

30. If a partner, without the consent of the other partners, carries on any business of the same nature as and competing with that of the firm, he must account for and pay over to the firm all profits made by him in that business.

"Partnership," p. 312.

The rule laid down in this section depends upon the same principles as that contained in the preceding section, and is illustrated by the cases of *Russell* v. *Austwick* (1826) (*o*), *Lock* v. *Lynam* (1854) (*p*), and other cases referred to in "Partnership," pp. 310—312.

Partner competing with firm.

If a partner carries on a business which is not of the same nature as and does not compete with that of the firm, his partners have no right to the profits he may make even if he has agreed not to carry on any separate business (*q*), though if there is such a covenant they may obtain an injunction, and perhaps damages for the breach of covenant (*r*).

It follows from this rule, as pointed out by Sir Frederick Pollock (*s*), that no partner can, without the consent of his co-partners, be a member in a other firm carrying on the like business in the same field of competition; and if that consent is given he is limited by its terms.

Scotch Law.

Scotch Law. Competition.

It does not appear that there is any direct authority in the law of Scotland in support of this proposition, but it flows from the exuberant trust on which the relation of partnership is based, and is in harmony with the law as applied in Scotland. Of course there may be difficulty in many cases in establishing the fact of competition, for the businesses may be carried on in different localities, and this may or may not be inconsistent with competition.

Rights of assignee of share in partnership.

31.—(1.) An assignment by any partner of his share in the partnership, either absolute or by way of mortgage or redeemable charge, does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any accounts of the partnership transactions, or to inspect the partnership books, but entitles the assignee only to receive the share of profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by the partners.

(*o*) 1 Sim. 52.
(*p*) 4 Ir. Ch. 188.
(*q*) *Dean* v. *MacDowell* (1878), 8 Ch. Div. 345.
(*r*) *Ibid.*
(*s*) "Digest of the Law of Partnership," 5th ed. p. 83.

Section 31.

(2.) In case of a dissolution of the partnership, whether as respects all the partners or as respects the assigning partner, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution.

"Partnership," pp. 363 *et seq.*

Assignment, how far a ground for dissolution.

Before the passing of this Act an assignment by one partner of his share in the partnership dissolved the partnership if it were at will, and in other cases gave his co-partners the right to dissolve (*ss*). It is to be regretted that neither this, nor any other section of the Act, expressly states how far the assignment or charge by a partner of his share in the partnership operates as a dissolution of the partnership, or a cause of dissolution at the option of the other partners. From the silence of §§ 32 & 33 on this subject, it would appear that the assignment of a share in no case operates as a dissolution (*t*). This is of slight importance in the case of partnerships for an undefined term, as they may be dissolved at any time upon notice (§§ 26 & 32 (c), nor will it be of much consequence in the case of partnerships for a fixed term if the other partners have a right to treat the assignment as a ground for dissolution. But from the silence of the Act on this point and the express mention in § 33 (2), of the option to dissolve when a partner suffers his share of the partnership property to be charged under § 23 for his separate debts, it may be that an assignment or charge by a partner gives no right of dissolution unless his co-partners can bring the case within § 35, and so obtain a dissolution by the Court.

This section, like all the other sections in this group (see § 19), only operates so far as there is no agreement to the contrary between the partners. If the partners agree, whether by their articles or subsequently, that any partner may assign his share in the partnership, and that the assignee shall become a partner or have certain rights of account or otherwise, such an agreement would be binding on them (*u*). Perhaps, also, a judgment creditor who obtains a charging order under § 23 will be entitled to all the rights which the partner, whose share is charged, is entitled, as between himself and his co-partners, to confer on a mortgagee of his share, even if such rights exceeded those enumerated in this section (see the concluding words of § 23 (2)).

SUB-SECTION 1.

Sub-section (1). Rights of assignee against assignor.

As against the other partners.—This section does not deal with the rights of the assignee against his assignor: these rights are left to be determined

(*ss*) See "Partnership," p. 363.

(*t*) But qu. if § 46 leaves the law as before.

(*u*) *Jefferys* v. *Smith* (1826), 3 Russ. 158; *Lovegrove* v. *Nelson* (1834), 3 M. & K. 1; and "Partnership," pp. 364—365, and *supra*, § 24 (7).

Section 31.

by the general law. If, therefore, a partner charges his share, in favour of another by deed, the latter will probably, as against the former, be entitled to sell the share or appoint a receiver under the powers conferred upon mortgagees by the Conveyancing Act, 1881 (*x*).

An assignee of a share in a partnership can compel his assignor to account to him for all profits he may have received (*y*). But a mortgagee can not compel his mortgagor to account retrospectively.

During the continuance of the partnership.—It may be a question whether in the case of a partnership for a fixed term the assignee of a share would have the right to receive his assignor's share of the partnership assets at the expiration of that term, if the partners continue the partnership without any settlement of the partnership affairs, see *supra*, § 27 and § 32 (a).

Only to receive the share of profits, &c.—These words appear to prevent an assignee from obtaining during the continuance of the partnership any moneys to which his assignor may be entitled which are not strictly profits: compare § 23 (2), "profits . . . . or any other money."

The assignee must accept the account of profits agreed to by the partners.—This settles a doubtful point of law; though there does not appear to be any express decision recognising the right of an assignee to an account during the continuance of the partnership, opinions in favour of such a right are to be found (*z*).

Scotch Law.

Scotch Law. Assignation of interest in firm.

This section is in accordance with the existing law, but there is a lack of authority on the subject. Erskine (*a*) lays it down that one partner may assume another person into partnership, who thereby becomes a partner not of the firm but of the assumer; and he adds: "The company are not bound to regard the second contract formed by the assumption which is limited to the share of the partner assuming. He still continues with respect to the company the sole proprietor of that share and must sustain all actions concerning it." See also Lord Eldon in *Barrow* (1815) (*b*).

In *Cassells* v. *Stewart* (1879) (*c*), Lord Moncreiff said: "It cannot be disputed upon the decided cases that although there is a *delectus personæ* in the contract of copartnery, any partner may, if he chooses, assign his own share to a third party as long as that does not interfere with the conduct of the company, or the respective rights and interests of the partners. There is nothing to prevent this at common law." Lord Gifford said: "An out-and-out assignation of Reid's interest was quite lawful, provided

(*x*) See §§ 19 & 2 (i.) (vi.) of that Act. The definition of property in § 2 (i.) is wide enough to cover a share in a partnership and would probably do so; but see *Blaker* v. *Herts & Essex Waterworks Co.* (1889), 41 Ch. D. 399.

(*y*) *Brown* v. *De Tastet* (1821), Jac. 284.

(*z*) See *Whetham* v. *Davey* (1885), 30 Ch. D. 574; and other cases cited, "Partnership," p. 364.

(*a*) III. 3, 22.

(*b*) 2 Rose, 215.

(*c*) 6 R. 945.

Reid continued a partner, and fulfilled all the conditions of the contract;" and he accepts Lord Justice Lindley's statement of the law (*d*) as accurate for Scotland. Section 31.

The transaction between the cedent and the assignee is legal; but the cedent remains the partner exercising all his rights as such, and the assignee cannot be introduced as a partner without the consent of the other partners. To complete, however, the assignee's right, such as it is, and give a preference over the cedent's creditors, intimation to the firm, or all the partners, is necessary, unless the cedent and assignee are the only partners, in which case intimation is unnecessary and incongruous (*dd*).

If the other partners accept the assignee as a partner, the cedent's rights as such cease, and the cedent has no right to exclude the assignee. This seems to be implied in the first sub-section. The second sub-section proceeds on the footing that the assignee has not been received prior to the dissolution, otherwise his partnership account would date from his reception, not from the dissolution. The amount due becomes a debt from the date of dissolution, bearing interest. See § 43, *infra*.

The leading decisions on the subject of this section are *Russell* v. *Earl of Breadalbane* (1827) (*e*), *Hill* v. *Lindsay* (1846) (*f*), *Cassells* v. *Stewart* (1879) (*g*). See also *Lonsdale Hæmatite Co.* v. *Barclay* (1874) (*h*), where partners were by contract allowed to assign their shares on condition of first offering them to the firm and partners.

Sub-section 2.

Sub-section (2) is in accordance with the previous law (*i*). Sub-section (2).

(*d*) Vol. i. p. 698, 4th edition [5th edition, p. 634.]

(*dd*) *Per* Lord Fullerton, 8 D. 480.

(*e*) 5 S. 827, affd. 5 W. & S. 256.

(*f*) 8 D. 472, and 10 D. 78.

(*g*) 6 R. 936, affd. L. R. 6 App. 64.

(*h*) 1 R. 417.

(*i*) *Whetham* v. *Davey* (1885), 30 Ch. D. 574.

Dissolution of Partnership, and its consequences.

Dissolution by expiration or notice.

32. Subject to any agreement between the partners, a partnership is dissolved—

(*a.*) If entered into for a fixed term, by the expiration of that term:

(*b.*) If entered into for a single adventure or undertaking, by the termination of that adventure or undertaking:

(*c.*) If entered into for an undefined time, by any partner giving notice to the other or others of his intention to dissolve the partnership.

In the last-mentioned case the partnership is dissolved as from the date mentioned in the notice as the date of dissolution, or, if no date is so mentioned, as from the date of the communication of the notice.

"Partnership," pp. 570 *et seq.*

Partnership for a fixed term.

It is presumed, though there appears to be no actual decision on the point, that a partnership for the joint lives of the partners is a partnership for a fixed term, which would expire on the death of the partner who first died.

If a partnership for a fixed term is continued after the expiration of the term without any express new agreement, the rights and duties of the partners remain the same as they were at the expiration of the term so far as is consistent with a partnership at will (see *supra*, § 27). The partnership then becomes a partnership for an undefined time, and may be dissolved by notice (see clause (*c*) of this section and § 26).

Partnerships for a single adventure.

For instances of partnerships for a single adventure or undertaking, see "Partnership," p. 49.

Partnerships for an undefined time.

A partnership is presumed to be a partnership at will unless some agreement to the contrary can be proved (*k*). Such an agreement may be either express or implied (*l*).

Except in the case of partnerships constituted by deed (see § 26 (2)) the Act is silent as to the form of notice; the existing law (*m*) on this subject will therefore continue (see § 46).

A partner may waive his right to receive a formal notice of dissolution, and such waiver may be inferred from the conduct of the parties (*n*).

(*k*) *Heath* v. *Sanson* (1832), 4 B. & Ad. 175, and "Partnership," p. 121.

(*l*) *Crawshay* v. *Maule* (1818), 1 Swanst. 509.

(*m*) See *supra*, § 26, and notes, and "Partnership," pp. 426 and 571.

(*n*) *Pearce* v. *Lindsay* (1860), 3 De G. J. & Sm. 139.

The date of dissolution was the same under the previous law (*o*).

Even after a dissolution the rights and obligations of the partners continue so far as is necessary to wind up the affairs of the partnership and to complete unfinished transactions: see § 38.

Date of dissolution.

As to the effect of a dissolution on third parties, see § 36.

Scotch Law.

Scotch Law.

(*a.*) This is the existing law. "Partnership dissolves by the consent and mutual act of the parties in terms of the contract, *i.e.*, by expiration of the term appointed for its duration. At the same time it may be renewed or continued by tacit consent, not to the effect of engaging the parties again for a renewal of the original term, but to the effect of engaging them as partners for an indefinite time, and so dissoluble at pleasure" (*p*), and on the same terms so far as applicable (*q*). It would appear that the term of endurance if not fixed by the contract may be inferred from other circumstances; but it has been ruled that the duration of a lease is not by itself conclusive, and the unexpired lease falls to be sold (*r*). *Marshall* (1816) (*s*), *McNiven* v. *Peffers* (1868) (*t*), *Aitken* v. *Shanks* (1830) (*u*), *McWhannell* (1830) (*x*). But see *contra* observations of Lord President (Inglis) in *Miller* v. *Walker* (1875) (*y*), a case of joint adventure.

Expiration of fixed term.

(*b.*) As in the case of a fixed term the relation may be continued or extended by the actings of parties beyond the original adventure: *Davie* v. *Buchanan* (1880) (*z*).

Single adventure.

(*c.*) This is the recognised law. See *supra*, § 26 (1). If one partner gave notice, specifying a date more or less distant, it would still be in the power of another partner to expedite the dissolution, by a notice with a shorter date, or without specified date. The first notice would not of itself make an agreement for a fixed term. But (*quære*) might not the actings of parties on such a first notice rear up an agreement?

Notice of dissolution.

33.—(1.) Subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner.

Dissolution by bankruptcy, death or charge.

(2.) A partnership may, at the option of the other partners, be dissolved if any partner suffers his share of the partnership property to be charged under this Act for his separate debt.

(*o*) *Robertson* v. *Lockie* (1846), 15 Sim. 285; *Bagshaw* v. *Parker* (1847), 10 Beav. 532; *Mellersh* v. *Keen* (1859), 27 Beav. 236.
(*p*) 2 Bell's Com. 521.
(*q*) *Supra*, § 27 (1).
(*r*) 2 Bell's Com. 523.
(*s*) 23rd Feb. 1816, F. C.
(*t*) 7 Mc. 181.
(*u*) 8 S. 753.
(*x*) 8 S. 914.
(*y*) 3 R. 242 (249).
(*z*) 8 R. 319.

Section 33. "Partnership," p. 570.

This section applies alike to partnerships for a fixed term and partnerships at will, but, as in the case of the preceding section, it is subject to any agreement between the partners.

SUB-SECTION 1.

Sub-section (1). Sub-section 1 is in accordance with the previous law. It was decided as long ago as *Crawford* v. *Hamilton* (1818) (*a*), that although a partnership is entered into for a term of years, it is previously dissolved by the death of a partner unless there be an agreement to the contrary; the same rule was recognised in the case of bankruptcy in *Fox* v. *Hanbury* (1776) (*b*).

Foreign bankruptcy. It may be a question how far proceedings in a foreign country equivalent to an English bankruptcy cause a dissolution of the partnership. There does not appear to be any decision on the point. But it is submitted that such proceedings would cause a dissolution, at any rate if taken in the country in which the bankrupt partner is domiciled. If the bankruptcy is not in the country of the partner's domicile, it appears to be doubtful whether the English law would recognise the title of the assignee in bankruptcy to the partner's share in an English partnership (*c*), and if that be so, it may be that such a bankruptcy would not cause a dissolution.

Date of dissolution. The act does not fix the date from which the dissolution is to take effect. In the case of death there is no difficulty. In the case of bankruptcy, the date of dissolution will, it is presumed, be the date of the commencement of the bankruptcy (*d*). By the Bankruptcy Act, 1883 (*e*), the bankruptcy of a debtor is deemed to commence at the time of the act of bankruptcy being committed on which a receiving order is made against him, or if the bankrupt is proved to have committed more acts of bankruptcy than one, to commence at the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the petition.

Scotch Law.

Scotch Law. Death of partner. *Death.*—This is in conformity with existing law. "The whole society is dissolved by the death of one or more of the partners. . . . . And the fixing of a definite term of duration for the partnership will not continue it after the death of a partner, without special stipulation." And even where a person is appointed to succeed one dying, if "such person does not choose

(*a*) 3 Madd. 251, and "Partnership," p. 590.

(*b*) Cowp. 448, and "Partnership," p. 649.

(*c*) See *Re Artola Hermanos* (1890), 24 Q. B. Div. 649; *Re Blithman* (1866), 2 Eq. 23; but see Foote, Private International Jurisprudence (2nd ed.), pp. 308 *et seq.*; and Dicey on Domicil, p. 288, and cases there cited.

(*d*) See *Harvey* v. *Crickett* (1816), 5 M. & S. 341; *Thomason* v. *Frere* (1808), 10 East, 418, and other cases cited "Partnership," p. 667.

(*e*) 46 & 47 Vict. c. 52, § 43. The section does not apply to Ireland or Scotland, see § 2.

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to accept, the death of the person so making the appointment operates as the dissolution" (*f*). *Hill* v. *Wylie* (1865) (*g*) is an illustration, however, of the continuance in terms of the contract of a partnership with the representatives of a deceased partner, who were held neither bound nor entitled to make an election in the matter. In *Young* v. *Collins* (1852–53) (*h*), the House of Lords applied the general rule that when a partnership is dissolved by the death of a partner the surviving partners are entitled to wind up the business. See also section 39, *infra*, and cases of *Dickie* v. *Mitchell* (1874) (*i*), *Russell* v. *Russell* (1874) (*j*) and *Gow* v. *Schulze* (1877) (*k*), as to circumstances in which the Court will appoint judicial factor to wind up partnership estate.

Bankruptcy of partner.

Bankruptcy.—See also § 47, *infra*, which provides that the bankruptcy "of an individual shall mean sequestration under the Bankruptcy (Scotland) Acts and also . . . . the issue against him of a decree of *cessio bonorum*." Under the existing law mere insolvency of a partner does not dissolve the partnership: *Paterson* v. *Grant* (1749) (*l*). Bankruptcy by sequestration which produces incapacity and transfers the bankrupt's estate to a trustee does, and so also it was thought would the granting of a trust deed for behoof of creditors (*m*).

But "notour bankruptcy" under the Act 1696, c. 5, and later Acts, does not operate as a transfer, nor tie up the hands of a partner from carrying on business, but only cuts down preferences to creditors, granted at or after a certain date, or within sixty days previously; and accordingly "notour bankruptcy" has not hitherto been understood to dissolve partnership. Bell, *supra*. No change in this respect is thus made by this sub-section.

Insolvency, notour bankruptcy, and granting a trust deed for creditors are frequently in contracts of co-partnery declared to dissolve the partnership: *Monro* v. *Cowan* (1813) (*n*); *Hannan* v. *Henderson* (1879) (*o*). In the latter case it was observed that such a conventional irritancy must be enforced according to its terms, and cannot be purged.

A firm is rendered notour bankrupt by any of the partners being rendered so for a firm debt. Bankruptcy (Scotland) Act, 1856, § 4.

The Bankruptcy Acts are: The Bankruptcy (Scotland) Act, 1856 (19 & 20 Vict. c. 79), The Bankruptcy and Real Securities (Scotland) Act, 1857 (20 & 21 Vict. c. 19), The Bankruptcy (Scotland) Amendment Act, 1860 (23 & 24 Vict. c. 33), The Bankruptcy (Scotland) Amendment Act, 1875 (38 & 39 Vict. c. 26), The Conveyancing Amendment Act, 1879 (42 & 43 Vict. c. 40). See Goudy on Bankruptcy, 1886.

The Cessio Acts are those of 1836 (6 & 7 Wm. IV. c. 56) and 1876 (39 & 40 Vict. c. 70, § 26), the Debtors (Scotland) Act, 1880 (43 & 44 Vict. c. 35), and the Bankruptcy and Cessio (Scotland) Act, 1881 (44 & 45 Vict. c. 22).

(*f*) 2 Bell's Com. 524.
(*g*) 3 Mc. 541.
(*h*) 14 D. 540; 1 Macq. App. 385.
(*i*) 1 R. 1030.
(*j*) 2 R. 93.
(*k*) 4 R. 928.
(*l*) M. 14, 578.
(*m*) 2 Bell's Com. 524.
(*n*) 8th June, 1813, F. C.
(*o*) 7 R. 380.

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SUB-SECTION 2.

Sub-section (2).

Sub-section 2 is new and has reference to the new procedure substituted by § 23 for the old method of levying execution against a partner for his separate debt.

The statute does not prescribe the manner or time in which the option is to be exercised. Any unequivocal act done to the knowledge of the partner whose share is charged will be an exercise of the option which cannot be withdrawn (*p*). The option must be exercised within a reasonable time (*q*).

The question arises whether each of the other partners has an option of dissolving the partnership or whether there is but one option given to all. As a general rule, if several persons have an election the first election made by any one of them would seem to determine the election for all (*r*), but this rule can hardly apply to the case referred to in this section. The majority would not it is conceived have the power to dissolve the partnership against the wishes of the minority (see § 24 (8)). The meaning apparently is either that all the other partners must be unanimous, or that a separate option is given to each of the other partners, so that any one of them can dissolve the partnership, whether the others have or have not expressed their intention of not doing so.

Date of dissolution.

As no date is fixed from which the dissolution is to take effect, it is presumed that it will date from the time at which the option is exercised.

It will be noticed that the words "*as regards all the partners*," which occur in sub-section 1, do not occur in sub-section 2; in spite of this variation in the language of the two sub-sections, it is conceived that their meaning is the same. The words in question do not occur in §§ 26, 32, 34 or 35, in all of which a dissolution as regards all the partners is clearly intended.

As to the question whether an assignment or a mortgage by a partner of his share in a partnership gives his co-partners any right of dissolution, see *supra*, § 31 and notes.

Scotch Law.

SCOTCH LAW.

This sub-section does not apply to Scotland. See section 23 (5), and notes thereon. Neither arrestment nor assignment of a partner's share operate dissolution; and this sub-section gives no option of dissolution to partners in Scotch firms. See section 35 (*f*), *infra*, p. 94.

Dissolution by illegality of partnership.

34. A partnership is in every case dissolved by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the members of the firm to carry it on in partnership.

(*p*) *Scarf* v. *Jardine* (1882), 7 App. Ca. p. 361; *Clough* v. *L. N. W. Rail. Co.* (1871), L. R. 7 Ex. 34.

(*q*) *Anderson* v. *Anderson* (1857), 25 Beav. 190; *Scarf* v. *Jardine* (1882), 7 App. Ca. pp. 360—361.

(*r*) Co. Litt. 145a.

"Partnership," p. 585.

This section is in accordance with the previous law.

The two most probable events which will cause a dissolution under this section are a change in the law, and the outbreak of war. If a partnership exists between two persons residing and carrying on trade in different countries, and war is proclaimed between those countries, this will dissolve the partnership (*s*).

Scotch Law.

SCOTCH LAW. Unlawful event happening.

There does not appear to be any direct authority in the Law of Scotland on these points. But there are illustrations of original illegality, resulting in the court refusing its aid to either party in an accounting, or other claims arising out of it: *A. B.* v. *C. D.* (1832) (*t*); *Gordon* v. *Howden* (1845) (*u*); *Fraser* v. *Hair* (1848 (*x*); *Fraser* v. *Hill* (1853—54) (*y*); *Gibson* v. *Stewart* (1840) (*z*). The illegality under this section must be inherent in the purposes of the firm, not merely in some particular act of the firm or partners, or in the mode in which an otherwise lawful act may be carried out.

Dissolution by the Court.

35. On application by a partner the Court may decree a dissolution of the partnership in any of the following cases:

(*a.*) When a partner is found lunatic by inquisition, or in Scotland by cognition, or is shown to the satisfaction of the Court to be of permanently unsound mind, in either of which cases the application may be made as well on behalf of that partner by his committee or next friend or person having title to intervene as by any other partner: (see *infra*, p. 86).

(*b.*) When a partner, other than the partner suing, becomes in any other way permanently incapable of performing his part of the partnership contract: (see *infra*, p. 88).

(*c.*) When a partner, other than the partner suing, has been guilty of such conduct as, in the opinion of the Court, regard being had to the nature of the business, is calculated to prejudicially affect the carrying on of the business: (see *infra*, p. 91).

(*d.*) When a partner, other than the partner suing, wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in

(*s*) *Griswold* v. *Waddington*, 15 Johns. 57, 16 ib. 438 (Amer.), cited Story on Partnership, § 315

(*t*) 10 S. 523.

(*u*) 4 Bell, App. 254.

(*x*) 10 D. 1402.

(*y*) 16 D. 789; 1 Macq. App. 392.

(*z*) 1 Robin. App. 260.

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matters relating to the partnership business that it is not reasonably practicable for the other partner or partners to carry on the business in partnership with him: (see *infra*, p. 92).

(*e*.) When the business of the partnership can only be carried on at a loss: (see *infra*, p. 93).

(*f*.) Whenever in any case circumstances have arisen which, in the opinion of the Court, render it just and equitable that the partnership be dissolved: (see *infra*, p. 93).

"Partnership," pp. 575 *et seq.*

The Court.—This expression includes every Court and judge having jurisdiction in the case, see § 45.

Lunacy Act, 1890.

By the Lunacy Act, 1890 (*a*), the judge in Lunacy (*b*) has power to dissolve a partnership where a member becomes lunatic (*c*). Lunatic under that act means an idiot or person of unsound mind (*d*). The power can also be exercised in the cases mentioned in § 116, which include *inter alia* the cases of persons lawfully detained as lunatics and of persons with regard to whom it is proved to the satisfaction of the Judge in Lunacy that they are through mental infirmity, arising from disease or age, incapable of managing their affairs. In exercising this power the Judge in Lunacy is to consider what is best for the lunatic and his family (*e*). It does not seem to be necessary for the exercise of the power under that Act that the partner should be of permanently unsound mind, or permanently incapable of managing his affairs (compare clauses (*a*) and (*b*) of this section).

Discretion of Court.

May decree a dissolution (*f*).—The Court has a wide discretion given to it, and though in exercising that discretion it will no doubt follow the principle of previous decisions, it must not be forgotten that the Court has a discretion, and will not be bound to dissolve a partnership *ex debito justitiæ* in any of the cases mentioned in the section (*g*). The principles upon which the Court acts in such cases are now fairly well settled, and will be found in the cases mentioned below and in "Partnership," pp. 575 *et seq.*

Scotch Courts.

As to the Courts having jurisdiction in Scotland, see notes on § 45, *infra*.

CLAUSE (*a*).

Clause (*a*). Lunacy.

Clause (*a*) makes no alteration in the previous law, but settles (so far, at least, as regards a dissolution under this clause) the doubt which formerly existed as to whether a decree for the final dissolution of a partner-

(*a*) 53 Vict. c. 5.
(*b*) See ib. § 108.
(*c*) Ib. § 119.
(*d*) Ib. § 341.
(*e*) Ib. § 116 (4).
(*f*) The introductory words of this section are very similar to those of § 79 of the Companies Act, 1862.
(*g*) See as to the meaning of the word "may," *Julius* v. *Bishop of Oxford* (1880), 5 App. Ca. at p. 235, and *Re Baker* (1890), 44 Ch. Div. 262.

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ship could be made, in an action commenced by the next friend of a partner of unsound mind, without the appointment of a committee in lunacy (*h*).

Dormant partner.

It has long been recognised that lunacy does not of itself dissolve a partnership, but that the confirmed lunacy of an active partner is sufficient to induce the Court to order a dissolution (*i*). This clause applies as well to the case of a dormant as to that of an active partner. The reason for granting a dissolution in the case of lunacy is the permanent incapacity of the lunatic to perform his part of the partnership contract (*k*). As a dormant partner has, as a rule, no duties to perform, there would be no reason for the Court, except under very special circumstances, to order a dissolution on the ground of his insanity.

Of permanently unsound mind.—Temporary incapacity was not considered by the Court of Chancery sufficient to warrant an application for dissolution (*l*). A person will be considered as of permanently unsound mind "when the evidence shows a reasonable ground for supposing a recovery to be hopeless, or at least very improbable, during the remainder of the time for which the partnership contract is to endure" (*m*). As to the powers of a Judge in Lunacy under the Lunacy Act, 1890, see *supra*, and see *infra* on clause (*f*).

The evidence must shew that the insanity exists at the time of the application, and if necessary an inquiry will be directed to ascertain the state of mind of the alleged lunatic (*n*); no such inquiry is necessary if the partner be a lunatic so found by inquisition (*o*).

Costs of the dissolution are ordered to be paid out of the partnership assets (*p*).

Scotch Law.

Scotch Law.

Insanity of partner.

The common law is comprehensively stated by Lord President Inglis in the recent case of *Eadie* v. *McBean's Curator bonis* (1885) (*q*), thus: "There can be no doubt that under ordinary circumstances where two or more persons are engaged in business together as partners, and all of them are expected or by contract of copartnery bound to take an active management of the business, the permanent insanity or incapacity of one of the partners necessarily operates a dissolution of the partnership." His Lordship then points out the difference between cases where the partner has to contribute personal skill and exertions, and where he merely provides the funds. See also Bell's Commentaries (*r*).

The cognition of the insane is now regulated by 31 & 32 Vict. c. 100,

(*h*) *Jones* v. *Lloyd* (1874), 18 Eq. 265.

(*i*) *Sayer* v. *Bennet* (1784), 1 Cox 107; *Waters* v. *Taylor* (1813), 2 V. & B. 303, and other cases cited "Partnership," p. 577.

(*k*) See ib. and *Jones* v. *Noy* (1833), 2 M. & K. 125.

(*l*) *Leaf* v. *Coles* (1851), 1 De G. M. & G. 171; *Anon.* (1855), 2 K. & J. 441, and other cases cited "Partnership," pp. 577—579.

(*m*) Ib. See also *Jones* v. *Lloyd* (1874), 18 Eq. p. 272.

(*n*) *Anon.* (1855), 2 K. & J. 441.

(*o*) *Milne* v. *Bartlet*, 3 Jur. 358.

(*p*) *Jones* v. *Welch* (1855), 1 K. & J. 765.

(*q*) 12 R. 660 (665).

(*r*) 2, 524.

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section 101; and Act of Sederunt, 3 Dec. 1868. The definition of insanity under that statute is: "such person shall be deemed insane if he be furious or fatuous, or labouring under such unsoundness of mind as to render him incapable of managing his affairs." Observe that *permanency* is not essential. A brieve of cognition may be prosecuted by the nearest agnate, or other near relation, but the person claiming the office of tutor must be the nearest male agnate of twenty-five years of age. If on the cognition being retoured to Chancery, he does not claim the office, a tutor dative may be appointed under 19 & 20 Vict. c. 56, § 19; or a curator bonis: *Larkin* v. *McGrady* (1874) (*s*). Without cognition a curator bonis may be appointed by the Court of Session to an insane person on the petition of any near relative, or other person interested. For this purpose the above definition of insanity is sufficient. Permanency does not require to be established. It would therefore appear that unless a partner has been formally cognosced the Court must be satisfied that he is of "*permanently unsound mind*" before decreeing a dissolution; but in neither case is the Court bound to decree a dissolution, and the discretion will probably be exercised in view of the circumstances of different partnerships, and the terms of their deeds as pointed out by the Lord President in the case of *Eadie*. There the Court refused to decree a dissolution where a partner had been incapacitated by paralysis, because under the contract personal services were not required of him. The questions of the unsoundness and its permanency are for the skilled opinion of medical experts.

The application will be made to the Court of Session on behalf of the lunatic partner, or by one or more of the other partners. The expressions "committee" and "next friend" are peculiarly English; but "person having title to intervene" will include tutor-at-law, tutor dative, or curator bonis. It would probably not include one who is merely entitled to sue out a brieve of cognition, or apply for appointment as tutor dative or curator bonis; for until the office is taken up, or the appointment made, there is no title to intervene.

Clause (*b*).

Clause (*b*). Permanent incapacity.

Clause (*b*) states the general principle of the application of which a dissolution on the ground of insanity affords the most common example; but there is no reason why the principle should be confined to these cases, nor has it been so confined. In *Whitwell* v. *Arthur* (1865) (*t*), the plaintiff sought a dissolution of his partnership with the defendant in consequence of the latter being incapacitated by a paralytic attack from performing his duties as a partner, and would have succeeded had not the medical evidence showed that the defendant's health was improving, and that his incapacity was probably only temporary; and other cases might easily be suggested (*u*).

(*s*) 2 R. 170.

(*t*) 35 Beav. 140.

(*u*) See Pothier, Traité du Con. de Soc., Nos. 142 and 152, and Treatise on the Law of Partnership, by Theophilus Parsons (3rd ed.), pp. 502 and 503.

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Marriage.

The marriage of a female partner, since the passing of the Married Women's Property Act, 1882 (*x*), no longer causes a dissolution of the partnership, but it might perhaps, in some cases, afford a ground for applying to the Court for a dissolution under this clause or clause (*f*), as depriving her of the power of independent personal action in matters of business (*y*).

It will be noticed that the application to the Court in cases coming under this clause must be made by a partner other than the partner incapacitated.

See also § 116 of the Lunacy Act, 1890, referred to *supra*, p. 86.

Scotch Law.

Scotch Law.

Permanent incapacity.

This is a statement of the principle in the law of Scotland of which insanity is an illustration, and, as observed by the Lord President in *Eadie* v. *McBean's Curator bonis* (1885) (*z*), the incapacity is to be judged of with reference to the particular contract and the duties required of the partner. Bodily ailment permanently incapacitating from all business, or necessitating residence permanently away from the seat of the business, would fall under this sub-section. Professor Bell says: "Perhaps the nearest approximation to be made to a rule on the subject is that a remedy and relief will be given only where the circumstances amount to a total and important failure in those essential points on which the success of the partnership depends" (*a*).

Marriage of female partner.

Common law.

The effect upon a firm of the marriage of a female partner is not stated in the act. As, by section 46, the common law is continued in force, except in so far as the act contains provisions inconsistent with it, it is necessary to consider the existing law on the subject. Professor Bell says: "The marriage of a female partner of a company seems a change so important that it should form a ground for dissolving the partnership" (*b*). He cites no authority. On the other hand, the Lord President (Inglis) in *Russell* v. *Russell* (1874) (*c*), says: "The dissolution of a business by the marriage of a female partner has the same effect as if it had been dissolved by the death of a partner. The female partner drops out of the firm just as if she were dead, because she is incapacitated from continuing. She cannot continue in the business without her husband, and she cannot bring him in." Lord Deas concurred and added, "The fact that the dissolution of the partnership took place by the marriage of one of the partners rather tells against the application" [for the appointment of a judicial factor to wind up] "than otherwise. The lady dissolved the partnership by her own voluntary act." Where, however, the *jus mariti* (*d*) and right of administration (*e*) were excluded, the wife was

(*x*) The act does not extend to Scotland, 45 & 46 Vict. c. 75, § 26.

(*y*) See Parsons on Partnership, p. 502.

(*z*) 12 R. 660.

(*a*) 2 Bell's Com. 525.

(*b*) 2 Bell's Com. 524.

(*c*) 2 R. 93.

(*d*) *Jus mariti* was "the right by which the husband acquired to himself absolutely the personal property of his wife," per Lord Fraser, "Husband and Wife," p. 676.

(*e*) Right of administration "is a

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held entitled to manage her separate estate and to enter into obligations and contracts in regard thereto which would bind it, just as if she were an unmarried woman. *Biggart* v. *City of Glasgow Bank* (1879) (*f*). The contract there in question was partnership by acquiring shares in a joint stock company. The exclusion of the *jus mariti* and right of administration by antenuptial contract even when done *per aversionem* and embracing *acquirenda* was recognized by the court as placing the wife's separate estate at her own disposal as if she were unmarried, *McDougall* v. *City of Glasgow Bank* (1879) (*g*).

Recent statutes.

Conjugal Rights Act, 1861.

Married Women's Property Act, 1877.

Married Women's Property Act, 1881.

By three recent statutes, however, the exclusion of the *jus mariti* and right of administration has been dealt with. (1.) By the Conjugal Rights (Scotland) Amendment Act, 1861 (*h*), a deserted wife obtaining a protection order and a wife obtaining a decree of separation are entitled to hold property subsequently acquired or succeeded to as separate estate. (2.) By the Married Women's Property (Scotland) Act, 1877 (*i*), the *jus mariti* and right of administration were, after 1st January, 1878, excluded from the earnings and property of married women acquired in any employment or trade, or through the exercise of any literary, artistic, or scientific skill and all such money and property, and the investments thereof, were declared separate estate. Lastly, by the Married Women's Property (Scotland) Act, 1881 (*k*), shortly stated (in the case of marriages entered into after its date), the *jus mariti* is excluded from all moveable estate of the wife, and the right of administration from the income of all her heritable and moveable estate; but it was declared that the wife should not be entitled to assign the prospective income of the moveable estate, nor, without her husband's consent, to dispose of the capital thereof. At common law she could not deal with her heritable estate without his concurrence.

Result.

If right of administration excluded.

The common law was stated by the Lord President and Lord Deas in the case of *Russell*, *supra*, prior to the recent Married Women's Property Acts and where there was no exclusion of *jus mariti* and right of administration. The result seems now to be that, wherever the wife has separate estate, it is possible for her, in the administration thereof, to enter into or continue in partnership, and to bind that estate in all obligations connected therewith. Her separate estate may or may not embrace the whole of her property, but to the extent to which it is separate, she has capacity, without the concurrence of her husband, to contract and bind it. At the same time, as the husband is the head of the family, and as the duties of a partner in a firm may involve personal attendance and services inconsistent with domestic duties, or opposed to the wishes of her husband, it is thought that he would be entitled to prohibit her joining a partnership (*l*). Such a case differs

right of managing property whereby the husband's consent must be obtained to every act of administration," *ibid.* 796.

(*f*) 6 R. 470.

(*g*) 6 R. 1089.

(*h*) 24 & 25 Vict. c. 86.

(*i*) 40 & 41 Vict. c. 29.

(*k*) 44 & 45 Vict. c. 21.

(*l*) Compare Lord President's opinion in *Ferguson's Tr.* v. *Willis & Co.* (1883), 11 R. 261 (268).

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materially from becoming a partner of a joint stock company by acquiring shares, which is merely a form of investment, and an act of management of her separate estate. Even where the husband does not object to her continuing in the firm, the other partners may, in some cases, find her "permanently incapable of performing her part of the partnership contract," within the meaning of this sub-section, and might, it is thought, successfully apply for decree of dissolution in terms thereof, or of sub-sections (*d*) or (*f*). Each case would depend on its own circumstances.

If right of administration not excluded.

Where, however, the right of administration is not, or is only partially excluded, as is the case under the Act of 1881, the wife could not bind her capital in questions either with her partners or the public; and the dilemma stated by the Lord President in the case of *Russell* would remain. But if either her husband concurs with her in placing her capital in the hands of the firm, a third party; or she is not called upon to put in any capital, why may she not act and contract as partner, *i.e.*, as agent of the firm, and bind the estate of the firm, a person separate from herself? This is the principle upon which, when stock of a public company is purchased with the husband's money, but the shares are taken in the wife's name, she is held to act as agent of her husband, and "consequently binds not herself but her husband only." *Thomas* v. *City of Glasgow Bank* (1879) (*m*), per Lord President (*n*) and Lord Shand (*o*).

Clause (*c*).

Clause (*c*).

Conduct injurious to business of firm.

Clause (*c*) in its original form was confined to the case of a partner becoming liable to a criminal prosecution, and this is perhaps as far as any reported case has gone (*p*). But a case, which does not appear to have been reported, was mentioned in argument before V.-C. Page Wood (*q*), in which a partnership between accoucheurs had been dissolved on the ground of the immoral conduct of one partner. The Vice-Chancellor pointed out that such conduct would materially affect the particular business of the firm (*r*). The clause in its present form is in accordance with that case; the test in every case under the sub-section is that mentioned by the Vice-Chancellor.

Guilty of such conduct.—This expression implies voluntary action, and an attempt by one partner to commit suicide while suffering from temporary insanity (*s*) would not justify a dissolution under this clause, even if such conduct would otherwise be within it.

The clause is not confined to conduct connected with the partnership business, all that is necessary is that the conduct be of such a nature as, having regard to the particular business of the firm, is calculated to injure

(*m*) 6 R. 607.

(*n*) Ib. p. 611.

(*o*) Ib. p. 614.

(*p*) *Essel* v. *Hayward* (1860), 30 Beav. 158.

(*q*) *Anon.* (1855—6) 2 K. & J. p. 446.

(*r*) But qu. whether the Vice-Chancellor would have granted a dissolution on such a ground, see ib. pp. 452, 453.

(*s*) As in *Anon.* (1855—56), 2 K. & J. 441.

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it; for instance, gambling on the Stock Exchange, though such gambling may be in no way connected with the business of the firm, would probably in some cases be a ground for dissolution under this clause (*ss.*)

Scotch Law.

Scotch Law. Scope of clause.

This clause seems to point at conduct unconnected with the partnership relation, but of such a kind as, considering the nature of the business, is detrimental to it, as distinguished from clause (*d*), where the conduct referred to is connected with the partnership relation and affairs, and makes continued joint action therein impracticable. Confirmed habits of intoxication would seem, according to the degree and circumstances thereof, to fall under either clause (*b*), (*c*) or (*d*). There does not appear to be direct authority in the law of Scotland on the subject of clause (*c*); but Professor Bell, figuring a case of uncontrollable habits of intoxication in a partner of a gunpowder manufactory, says, there can be no doubt that such perils would afford ground for dissolution by the Court, and even for at once entering an act of dissolution in the books of the firm (*t*).

CLAUSE (*d*).

Clause (*d*). Breach of partnership agreement.

Clause (*d*) is in accordance with the previous law (*u*). It is difficult to state what misconduct will be sufficient to induce the Court to order a dissolution under this clause, but instances in which such relief has been granted will be found collected or referred to in "Partnership," pp. 580 *et seq.* Here it will be sufficient to mention that keeping erroneous accounts (*x*), refusal to meet on matters of business (*y*), and continued quarrelling (*z*), have been held to justify a dissolution, but the Court will not interfere on account of mere squabbles and ill-temper (*a*).

The application under this and the two preceding clauses must not be made by the partner in fault, and this is in accordance with the previous law (*b*). The dictum by Lord Cairns in *Atwood* v. *Maude* (1868) (*c*), to the effect that, when it is admitted that a state of feeling exists which renders it impossible that the partnership can continue with advantage to either, it is immaterial by whom the bill is first filed, cannot now be considered law.

(*ss*) See *Pearce* v. *Foster*, 17 Q. B. Div. 536.

(*t*) 2 Bell's Com. 525.

(*u*) See *Marshall* v. *Colman* (1820), 2 J. & W. 266; and *Harrison* v. *Tennant* (1856), 21 Beav. 482.

(*x*) *Cheeseman* v. *Price* (1865), 35 Beav. 142.

(*y*) *De Berenger* v. *Hammel* (1829), 4 Byth. & Jarm. (4th ed.) 287.

(*z*) *Baxter* v. *West* (1860), 1 Dr. & Sm. 173.

(*a*) See "Partnership," p. 466.

(*b*) *Harrison* v. *Tennant* (1856), 21 Beav. p. 493; *Fairthorn* v. *Weston* (1844), 3 Ha. 387.

(*c*) 3 Ch. p. 373.

Scotch Law.

SCOTCH LAW.

See above note on clause (*c*). Conduct of this description amounting to a breach of the contract of a partnership was reached by the common law. See *Macpherson* v. *Richmond* (1869) (*cc*).

CLAUSE (*e*).

Clause (*e*) is in accordance with the previous decisions. In *Jennings* v. *Baddeley* (1856) (*d*), V.-C. Wood said: "If this concern cannot be worked at a profit I consider the case as falling within the authority of *Baring* v. *Dix* (1786) (*e*), and *Bailey* v. *Ford* (1843) (*f*); and indeed it would almost seem that nothing more than common sense is required to lead to the conclusion that in a common case of partnership formed, as all partnerships must be, for the purpose of an effectual working at a profit, you cannot force the partners to continue the co-partnership when it is clearly made out that the business is no longer capable of being carried on at a profit."

Clause Certainty of loss.

If the firm is already insolvent and becomes more so every day, the Court will interfere on motion and appoint a person to sell the business and wind up the affairs of the partnership (*g*).

Scotch Law.

In the case of a joint adventure in a mine, which had been unsuccessfully tried for three years, the Court found "that the lead mine has not hitherto yielded any profit, and that there is no reasonable prospect of profits being realized in future," and accordingly held that one of two partners was entitled to put an end to the adventure: *Miller* v. *Walker* (1875) (*h*). The same would hold in partnership proper. The terms of this clause seem to impose a somewhat heavier onus on the partner seeking a dissolution.

SCOTCH LAW. Certainty of loss.

In regard to the date of dissolution the Lord President in the above case observed that the partner was not entitled to put an end to the adventure at a day's notice, but was entitled to have it settled in the course of the action that the adventure was to be brought to an end. The date of the decree in this and the following clause will be the date of the dissolution, unless some other date be fixed by the decree.

Date of dissolution.

CLAUSE (*f*).

Clause (*f*) is apparently inserted in order to extend the power of the Court to decree a dissolution (*supra*, p. 6). Most, if not all, of the

Clause *f*). Just and equitable.

(*cc*) 41 Scot. Jurist, 288.
(*d*) 3 K. & J. 78.
(*e*) 1 Cox, 213.
(*f*) 13 Sim. 495. See also "Partnership," p. 576.
(*g*) *Bailey* v. *Ford* (1843), 13 Sim. 495.
(*h*) 3 R. 242.

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cases in which a dissolution has been granted would fall under one or other of the preceding clauses, but it is nowhere definitely stated that these are the only cases in which the Court would have granted such relief.

The clause, coming as it does after a number of particular instanc in which a dissolution may be ordered, will perhaps be limited in its application to cases *ejusdem generis* as those mentioned in the previous parts of this section (*i*). Any case, however, in which it is no longer reasonably practicable to carry out the partnership contract according to its terms will, it is apprehended, be within this section (*k*).

Assignment of share.

As already pointed out (see § 31 and notes), the assignment of a share in a partnership for a fixed term does not dissolve the partnership, but since such an assignment was, before the passing of this act, considered to be a good cause for dissolution (*l*), it may well be that the Court will decree a dissolution in such cases on the application of any partner other than the partner who has assigned his share (*m*). The Court may however consider that such an assignment will not of itself be a ground for a dissolution, now that the rights of an assignee are limited to those mentioned in § 31, and that his right to compel the firm to come to an account with him during the continuance of the partnership is clearly negatived.

Date of dissolution.

No mention is made in this section of the date as from which the partnership is to be dissolved. The rule in such cases was, and still is (see § 46), that where the order of the Court is necessary for the dissolution of the partnership, the dissolution will, in the absence of special reasons, date from the judgment (*n*). If the partnership has been effectually dissolved by notice, the dissolution will date from the time at which it was so dissolved, whether the notice has been given under the general power which exists for that purpose in the case of partnerships at will (*o*), or under a special power conferred upon the partners by agreement (*p*). If the partnership is at will the Court may treat the writ as a notice of dissolution, and declare the partnership dissolved as from that date (*q*).

Scotch Law.

Scotch Law.

Cases have occurred where in consequence of change of circumstances a partnership or joint adventure was brought to an end though originally

(*i*) See the interpretation put upon the similar clause in the Companies Act, 1862, § 79 (5) in *Suburban Hotel Co.* (1867), 2 Ch. 737; and *Ex parte Spackman* (1849), 1 Mac. & G. 170; a decision under the earlier act.

(*k*) See *supra*, p. 6.

(*l*) See "Partnership," pp. 363 and 583; and see § 46.

(*m*) Compare § 33 (2).

(*n*) *Lyon* v. *Tweddell* (1881), 17 Ch. Div. 529; *Besch* v. *Frolich* (1842), 1 Ph. 172.

(*o*) *Mellersh* v. *Keen* (1859), 27 Beav. 236, and see *supra*, §§ 26 and 32 (c).

(*p*) *Robertson* v. *Lockie* (1845), 15 Sim. 285; *Bagshaw* v. *Parker* (1847), 10 Beav. 532; *Jones* v. *Lloyd* (1874), 18 Eq. 265.

(*q*) *Kirby* v. *Carr* (1838), 3 Y. & C. Ex. 184; *Shepherd* v. *Allen* (1864), 33 Beav. 577.

stipulated for a term of years. See *Montgomery* v. *Forrester* (1791) (*r*), where, after trial, a vessel bought for whale fishing proved unsuitable for the purpose; and *Barr* v. *Speirs* (1802) (*s*), where two of three partners who had engaged for three years in building houses, were held entitled to have the partnership dissolved upon large advances being required without prospect of success.

But this clause confers a wider discretion than the Court has hitherto possessed or exercised. It is to be observed, however, that the occasion for the Court's interference must be circumstances emerging since the partnership was entered into, rendering dissolution just and equitable; and apparently indicating that its continuance would be unjust or inequitable.

Quære, will the arrestment or assignment of a partner's share or interest form a ground for invoking the aid of the Court under this clause? It is thought that in some circumstances it may.

Rights of persons dealing with firm against apparent members of firm.

36.—(1.) Where a person deals with a firm after a change in its constitution he is entitled to treat all apparent members of the old firm as still being members of the firm until he has notice of the change.

(2.) An advertisement in the London Gazette as to a firm whose principal place of business is in England or Wales, in the Edinburgh Gazette as to a firm whose principal place of business is in Scotland, and in the Dublin Gazette as to a firm whose principal place of business is in Ireland, shall be notice as to persons who had not dealings with the firm before the date of the dissolution or change so advertised.

(3.) The estate of a partner who dies, or who becomes bankrupt, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable for partnership debts contracted after the date of the death, bankruptcy, or retirement respectively.

"Partnership," pp. 210 *et seq.*

This section is in accordance with the previous law.

The liability of a retired partner under this section depends upon the general rule that a principal is liable for the acts of his former agent to persons who, knowing him to have been an agent, continue to deal with him, unless proper notice has been given of the termination of his authority (*t*). Though a partner by his retirement from the firm terminates

(*r*) H. 748.
(*s*) 18th Feb. 1802, F. C.
(*t*) *Trueman* v. *Loder* (1840), 11 A. & E. 589.

Section 36.

the agency of his co-partners it follows, from the rule above stated, that he will still be liable for their acts to third parties who know him to have been in partnership with them, unless due notice of his retirement be given.

SUB-SECTION 1.

Sub-section (1).

Apparent Members.—The meaning of these words is not quite clear: they may limit the application of the sub-section to persons who by their names forming part of the firm name, appear to every one to be members of the firm, or they may include partners who are known by the persons dealing with the new firm to have been members of the old firm. The question is not of importance, for if the narrower meaning be correct, retired partners, whose names are not part of the firm name, will by the previous law (*u*) be under a liability to persons who know them to have been members of the firm similar to that of apparent members under this section.

Dormant partner.

A dormant partner, *i.e.*, a person who is not known to be a partner, will not be liable for the acts of his co-partners after his retirement, although no notice of his retirement be given; this was decided in *Carter* v. *Whalley*, (1830) (*x*), and is adopted by the present act (see sub-section 3 of this section). The liability under this section is a liability by way of estoppel (*y*).

Continued liability after notice of retirement.

When a retired partner has given due notice of his retirement his liability for the future acts of his former partners ceases (*z*), except in the two following cases:

1.—Under § 14 if he holds himself out as a partner (*a*).

2.—Under § 38 for the acts of his co-partners which are necessary to wind up the affairs of the partnership and to complete unfinished transactions (*b*).

For the liability of a deceased or retired partner for the debts and obligations of a firm incurred before his retirement see *supra*, § 17 (2).

Scotch Law.

Scotch Law.

Retiring dormant partner.

By the law of Scotland a dormant (called also a secret or latent) partner, retiring from a partnership, required, in order to avoid liability for its subsequent engagements, to take the same means as were necessary in the case of an ostensible partner, viz., as to customers (whether aware of his connection with the firm or not), to give special notice of his retirement, and as to the public to advertise it: *Hay* v. *Mair* (1809) (*c*), and other cases referred to by the Lord President in *Mann* v. *Sinclair* (1879) (*d*).

(*u*) See § 46, and "Partnership," p. 214.

(*x*) 1 B. & Ad. 11, and "Partnership," pp. 212 *et seq.*

(*y*) See *Scarf* v. *Jardine* (1882), 7 App. Ca. 345.

(*z*) See "Partnership," p. 215, and cases there cited.

(*a*) *Brown* v. *Leonard* (1820), 2 Chitty, 120; "Partnership," p. 216, and *supra*, § 14 and notes.

(*b*) See *infra*, § 38 and notes.

(*c*) 27th Jan., 1809, F. C.

(*d*) 6 R. 1078, 1085.

Section 36.

But, as pointed out by the Mercantile Law Amendment Commissioners, a retiring dormant partner in England requires to give special notice "to those persons, at that time having relations with the partnership, who were aware of his connection with it; but he need not give notice to any other persons, either specially or by public advertisement" (*e*); and they recommended that in this respect the law of Scotland should be assimilated to that of England. Dissatisfaction with the Scotch law was also expressed on the bench in the case of *Mann* v. *Sinclair* (1879), *supra* (*f*).

"Apparent members."

It is thought that the expression "apparent members" in this section is used to describe ostensible partners of the old firm, and dormant partners thereof, known as such to the person dealing with the firm. No change is thus made in the English law, and the assimilation of the Scotch law on the point is carried out.

Form of notice.

As to the form of notice to customers, the natural mode is by special circular, but an obvious change of the firm name has been held sufficient: *Dunbar* v. *Remington* (1810) (*g*). Advertisement and Gazette notice are not enough, unless brought home to the customer's knowledge: *Campbell* v. *McLintock* (1803) (*h*), *Sawers* v. *Tradeston Society* (1815) (*i*), *Bertram* v. *McIntosh* (1822) (*k*). But personal knowledge is sufficient without intimation: *Aytoun* v. *Dundee Bank* (1844) (*l*). See also Bell's Commentaries (*m*). In *Mann* v. *Sinclair*, *supra*, the circular was sent three years after the retirement, and in reference to a different change in the firm, but it gave notice by distinct implication; and was held sufficient.

Claim against dormant partner.

In that case it was also decided that the claim against a former dormant partner failing to give notice of retirement is not competent to the trustee in the bankruptcy of the firm from which he retired, because it is not based on partnership, but on representation as a partner, and the claim of the creditor depends on knowledge or notice in each individual case. The opinion was also expressed that a retired dormant partner so made liable would have a claim of relief against the bankrupt estate of the firm. On this last point, see *Wright* v. *Gardner's Trustees* (1831) (*n*).

Sub-section 2.

Sub-section (2). Notice of dissolution.

Sub-section 2 is in accordance with the previous law (*o*). It is to be observed that this sub-section only states that notice in the proper Gazette is sufficient notice as to persons who have not dealt with the firm before the change in its constitution occurred. Notice to such persons may be proved in other ways (*p*). With regard to persons who dealt with the firm, before

(*e*) Second Report (1855), p. 19.
(*f*) Per Lord Young, 6 R. 1081; and Lord Shand, 1088.
(*g*) 10th Mar. 1810, F. C.
(*h*) H. 755.
(*i*) 24th Feb. 1815, F. C.
(*k*) 1 S. 315.
(*l*) 6 D. 1409.
(*m*) 2. 530—1.
(*n*) 9 S. 721.
(*o*) See *Godfrey* v. *Turnbull* (1795), 11 Esp. 371, and other cases cited, "Partnership," p. 222.
(*p*) See cases cited, "Partnership," p. 222.

Section 36.

the change in the firm occurred, a notice in the Gazette is not sufficient unless it can be proved that the person, seeking to make the retired partner liable, saw it (*q*). In all such cases notice in point of fact must be proved, if this be done the form of the notice is immaterial (*r*).

Scotch Law.

Scotch Law. Gazette notice.

This is according to existing practice; but a Gazette notice might be counteracted by circumstances indicative of continued connection with the concern on the part of an individual, *e.g.*, allowing the name to continue on the premises and business documents (*s*).

Sub-section 3.

Sub-section (3).

Sub-section 3 contains the exceptions to the general rule stated in sub-section 1 and is in accordance with the previous law (*t*).

Death.

It was decided in the case of *Devaynes* v. *Noble* (1816) (*u*) that notice of death is not requisite to prevent liability from attaching to the estate of a deceased partner, in respect of what may be done by his co-partners after his decease. For by the law of England the authority of an agent is determined by the death of his principal, whether the fact of death is known or not (*x*).

The estate of a deceased partner may however be liable to contribute to debts contracted by his co-partners after his death in consequence of some agreement between him and his co-partners. And if the deceased partner has set apart the whole or a portion of his assets as a fund to be employed by his executors in the partnership business, and they have by so doing incurred liabilities to the creditors of the firm, such creditors are entitled to obtain out of that fund what, if anything, may be payable to the executors by way of indemnity for their liabilities (*y*).

The continuing partners may be liable for acts done after the death of their late partner under an authority given by the firm through him (*z*).

Bankruptcy.

That a bankrupt partner is not liable for partnership debts incurred after his bankruptcy has long been recognised (*a*).

Dormant partner.

The third case dealt with in this sub-section, namely the case of a partner who is not known to the person dealing with the firm to have been a partner, is not so much an exception to, as altogether outside the general rule, and has been already referred to (*b*).

(*q*) *Graham* v. *Hope* (1792), Peake, 154.

(*r*) See "Partnership," p. 223.

(*s*) 2 Bell's Com. 532. See § 14, *supra*.

(*t*) See "Partnership," p. 211.

(*u*) 1 Mer. 616.

(*x*) *Smout* v. *Ilbery* (1842), 10 M. & W. 1, and "Partnership," p. 211.

(*y*) See *re Gorton* (1889), 40 Ch. Div. 536; "Partnership," p. 607 and cases there cited.

(*z*) *Usher* v. *Dauncey* (1814), 4 Camp. 97.

(*a*) See "Partnership," p. 212.

(*b*) See *supra*, p. 96.

Scotch Law.

SCOTCH LAW.

These are cases in which notice is not necessary. In the case of death and bankruptcy it is according to existing law, the reason being that death is deemed to be a public fact, and bankruptcy is published: *Cheap* v. *Aiton* (1772) (*c*), a very crucial case; *Royal Bank* v. *Christie* (1839) (*d*); *Oswald's Trustees* v. *City of Glasgow Bank* (1879) (*e*). See also Bell's Commentaries (*f*). But "notour bankruptcy" under the Act 1696, c. 5, which is not published in the Gazette, is not sufficient to free from liability. See *supra*, § 33 (1).

As to the immunity of a dormant partner, not known to the person dealing with the firm to be a partner, this is a change from the existing law, as above explained; the reason being that as no credit was given on the faith of the retired dormant partner, no liability should attach to him.

37. On the dissolution of a partnership or retirement of a partner any partner may publicly notify the same, and may require the other partner or partners to concur for that purpose in all necessary or proper acts, if any, which cannot be done without his or their concurrence.

Right of partners to notify dissolution.

"Partnership," p. 214.

This section is in accordance with the decisions of *Troughton* v. *Hunter* (1854) (*g*), and *Hendry* v. *Turner* (1886) (*h*). If a partner refuses to concur in notifying a dissolution when his concurrence is necessary, an action to compel him to do so may be brought by his co-partners though they claim no other relief against him (*i*).

Scotch Law.

SCOTCH LAW.

In Scotland there is nothing to prevent a retired partner, himself alone, advertising or issuing a circular announcing his retirement, and such notice is enough for his protection. But the London Gazette notice cannot, it appears, be inserted without the signatures of the partners, and a statutory declaration by a solicitor: *Hendry* v. *Turner* (1886) (*k*). At the Edinburgh Gazette office a written notice, signed by a partner, and attested by two witnesses, intimating his own retirement, cannot be refused (*l*), and is in practice inserted. When the notice, however, takes the form of an announcement of the dissolution of the firm, it is the practice in that office to require the signatures, duly attested, of all the partners. The principle appears to

Edinburgh Gazette.

(*c*) 2 Paton, App. 283.
(*d*) 1 D. 745, and 2 Robin. App. 118.
(*e*) 6 R. 461.
(*f*) 2. 530.
(*g*) 18 Beav. 470.
(*h*) 32 Ch. D. 355.
(*i*) *Hendry* v. *Turner* (1886), 32 Ch. D. 355.
(*k*) *Supra.*
(*l*) 2 Bell's Com. 533.

Sections 37—38.

be that a partner is only entitled to notify his own retirement, and the dissolution *quoad* him which that involves, but not to notify a dissolution *quoad* other partners, who may be continuing the concern. Under this section the practice will probably continue where the notice involves a dissolution between parties not signing it.

Continuing authority of partners for purposes of winding-up.

38. After the dissolution of a partnership the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue notwithstanding the dissolution so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise.

Provided that the firm is in no case bound by the acts of a partner who has become bankrupt; but this proviso does not affect the liability of any person who has after the bankruptcy represented himself or knowingly suffered himself to be represented as a partner of the bankrupt.

"Partnership," pp. 217 *et seq.*

Extent of authority.

This section settles the law as to the extent of a partner's authority to bind the firm after a dissolution in accordance with the view expressed in "Partnership," p. 219, where the various cases on the subject are discussed. The more general statement that a firm notwithstanding its dissolution continues to exist so far as may be necessary for the winding up of its business is too wide.

It should be remembered that the authority of a partner to bind the firm may be effectually restricted by an agreement between the partners of which persons dealing with the firm have notice (see *supra*, § 8). If a partner previous to a dissolution has a limited authority to act for the firm, his authority will not be increased by this section, but will be continued within its former limitations for the purposes mentioned in the section.

The authority only extends to partners and not to the executors of a deceased, or the trustee of a bankrupt, partner.

Though as between themselves the authority of each partner is limited in the manner here mentioned, the firm may be bound by the acts of the partners to the same extent as before the dissolution, if proper notice of the dissolution be not given (see *supra*, § 36).

For cases illustrating the application of this section, see *Re Clough* (1885) (*m*); *Butchart* v. *Dresser* (1853) (*n*); *Morgan* v. *Marquis* (1853) (*o*); *Ex parte Owen* (1884) (*p*); and other cases referred to in "Partnership," pp. 217 *et seq.*

Bankrupt partner.

That the power of a partner to bind the firm ceases upon his bankruptcy

(*m*) 31 Ch. D. 324.
(*n*) 4 De G. M. & G. 542.
(*o*) 9 Ex. 145.
(*p*) 13 Q. B. Div. 113. See also *McClean* v. *Kennard* (1874), 9 Ch. 345.

has long been settled (*q*). His power determines as from the commencement of his bankruptcy (*r*).

Holding out.

The exception from the proviso in the case of a person holding himself out as a partner of the bankrupt was recognised in the case of *Lacy* v. *Woolcott* (1823) (*s*).

Scotch Law.

Scotch Law Winding-up.

This is the existing law. *Douglas Heron & Co.* v. *Gordon* (1795) (*t*). "The partnership is dissolved in so far as the power of contracting new debts is concerned, but continued to the effect of levying the debts, paying the engagements of the company, and calling on the partners to answer the demands" (*u*). Hence receipts to debtors of the firm in the firm name are valid (*x*). But one partner is not entitled to bind the others by bill even for an existing debt, "to embody debts in bills after dissolution." It would alter the *onus probandi*, and might subject to summary diligence: *Snodgrass* v. *Hair* (1846) (*y*). But where a partner charged with the winding up dispensed with notice of dishonour of a bill of the firm, it was held a reasonable act of administration, and the creditor did not thereby lose recourse against the retired partner. The rule is that after dissolution no valid draft, acceptance, or endorsation can be made by the firm; all the partners must join in it (*z*). It is usual but not imperative to sue in the firm's name, *Nicoll* v. *Reid* (1877) (*b*).

In regard to obligations of partners for transactions entered into before the dissolution, see *Milliken* v. *Love & Crawford* (1803) (*c*); *Ramsay's Exrs.* v. *Graham* (1814) (*d*); *Matheson* v. *Fraser* (1820) (*e*); *Anderson* v. *Rutherfurd* (1835) (*f*).

Proviso.

The proviso follows from the effect of the bankruptcy of a partner to dissolve the partnership. "Partnership is as effectually dissolved by sequestration as by death" (*g*). Being published there is notice of the withdrawal of the mandate. But this again is qualified by the doctrine of "holding out."

Rights of partners as to application of partnership property.

39. On the dissolution of a partnership every partner is entitled, as against the other partners in the firm, and all persons claiming through them in respect of their interests as partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm, and to have the

(*q*) *Hague* v. *Rolleston* (1768), 4 Burr. 2174; *Thomason* v. *Frere* (1808), 10 East 418.

(*r*) 46 & 47 Vict. c. 52, § 43, and *Thomason* v. *Frere* (1808), 10 East, 418, and "Partnership," p. 666.

(*s*) 2 Dowl. & Ry. 458, and see *supra*, § 14.

(*t*) 3 Paton's App. 428.

(*u*) 2 Bell's Com. 527.

(*x*) 2 Bell's Com. 534

(*y*) 8 D. 390.

(*z*) 2 Bell's Com. 534.

(*b*) 5 R. 137.

(*c*) H. 754.

(*d*) 18th Jan. 1814, F. C.

(*e*) H. 758.

(*f*) 13 S. 488.

(*g*) 2 Bell's Com. 530.

Section 39.

surplus assets after such payment applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners to the firm; and for that purpose any partner or his representatives may on the termination of the partnership apply to the Court to wind up the business and affairs of the firm.

"Partnership," 351 *et seq.*

Partner's lien

This section gives effect to what has been called the equitable lien which each partner has on the partnership property, and adopts the law which may be found in *West* v. *Skip* (1749) (*h*), and the other cases collected in "Partnership," 352 *et seq.*

Every partner is entitled; from the concluding words of this section it appears that the right extends to the representatives of a partner; this is in accordance with the previous law (*i*).

As against the other partners . . . . and all persons claiming through them in respect of their interest as partners. These words will include the executors of a deceased and the trustees of a bankrupt partner (*k*), the assignees of a partner's share (*l*), and, it is conceived, judgment creditors, who have obtained a charging order under § 23 of this Act, but will not include a person who *bonâ fide* purchases from one partner specific chattels belonging to the firm (*m*); such a purchaser acquires a good title to the chattels whatever lien the other partners might have had on them prior to the sale.

The property of the partnership. As to what constitutes the property of the partnership, see *supra*, §§ 20 and 21. The lien extends only to the partnership property as it existed at the time of the dissolution, and does not extend to what may have been subsequently acquired by the persons who continue to carry on the business (*n*).

Applied in payment of the debts, &c., for the rule for the distribution of the assets on the final settlement of accounts, see *infra*, § 44.

Due from them as partners. Sums due to the firm from a partner otherwise than in his character of a member must not be deducted in ascertaining the amount of such partner's share; an illustration of this will be found in the case of *Ryall* v. *Rowles* (1749) (*o*).

Loss of lien.

The right mentioned in this section is lost by the conversion of partner-

(*h*) 1 Ves. Sen. 239.

(*i*) See *Stocken* v. *Dawson* (1845), 8 Beav. 239, affd. 13 L. J. (Ch.) 282, and *West* v. *Skip* (1749), 1 Ves. Sen. 239.

(*k*) *Croft* v. *Pike* (1733), 3 P. W. 180.

(*l*) *Cavander* v. *Bulteel* (1873), 9 Ch. 79; and see *supra*, § 31.

(*m*) *Re Langmead's Trusts* (1855), 20 Beav. 20; and 7 De G. M. & G. 353, and "Partnership," p. 354.

(*n*) *Payne* v. *Hornby* (1858), 25 Beav. 280; cf. *West* v. *Skip* (1749), 1 Ves. Sen. 239, and see "Partnership," pp. 352—353.

(*o*) 1 Ves. Sen. 348, and 1 Atk. 165; see also *Meliorucchi* v. *The Royal Exchange Assurance Co.* 1 Eq. Ca. Ab. 8; *Croft* v. *Pike* (1733), 3 P. & W. 180.

ship property into the separate property of a partner (*p*) unless the right is specially retained (*q*). Section 39.

Apply to the Court. The Court, see *infra*, § 45.

The application must be made by an action.

The Court will, if necessary, grant an injunction (*r*) or appoint a receiver or a receiver and manager (*s*) to protect the partnership assets, or prevent a partner from doing any act which will impede the winding up of the concern.

Scotch Law.

SCOTCH LAW.

Realization.

The rights of partners and their representatives here defined are in accordance with the common law, subject to a qualification regarding winding up by the Court (*t*). In order to apply the partnership property as here stated there must be realization, and for this purpose, any partner or the representatives of a deceased partner may insist on a sale as the best evidence of value, and is not bound to accept a valuation: *Marshall* (1816) (*u*), *Stewart* v. *Simpson* (1835) (*x*). *McNiven* v. *Peffers* (1868) (*y*). But if a valuation has been agreed to, a sale will not afterwards be decreed: *McKersies* v. *Mitchell* (1872) (*z*).

Distribution.

The rights of the firm's creditors against the firm's property, which are preferable to those of private creditors of partners, being settled, the surplus is available for the partners; but here the separate debtor and creditor relations between each partner and the firm require to be adjusted,—what each partner owes to the firm being deducted from what the firm owes to him. If his debt to the firm exceeds he will require to contribute for the benefit of the other partners. The claim of the partners on the surplus assets of the concern is preferable to the claims of personal creditors (if any) of the partners as individuals: *Keith* v. *Penn* (1840) (*a*). The same principle holds if one of the partners be another firm or company or body corporate (*b*).

Winding up by Court.

The existing law in regard to the winding up, by a judicial factor appointed by the Court, of a dissolved firm's business was summarised by Lord President (Inglis) in *Dickie* v. *Mitchell* (1874) (*c*), thus:—

Rules.

(1.) "When all the partners in a co-partnery are dead, this Court has the power, and will exercise it, of appointing a factor to wind up the partnership estate:" *Dixon* v. *Dixon*, (1831—2) (*d*).

(2.) "If there are surviving partners, then, if there is no fault or

(*p*) *Lingen* v. *Simpson* (1824), 1 Sim. & Stu. 600; *Re Langmead's Trusts* (1855), 7 De G. M. & G. 353, the judgment of Turner, L.J.; *Holroyd* v. *Griffiths* (1856), 3 Drew. 428.

(*q*) *Holderness* v. *Shackels* (1828), 8 B. & C. 612.

(*r*) See "Partnership," pp. 541 *et seq.*

(*s*) See "Partnership," pp. 545 *et seq.*

(*t*) 2 Bell's Com. 535 and 507.

(*u*) 23rd Feb. 1816, F. C.

(*x*) 14 S. 72.

(*y*) 7 Mc. 181.

(*z*) 10 Mc. 861.

(*a*) 2 D. 633.

(*b*) See § 1, *supra*. 2 Bell's Com. 514.

(*c*) 1 R. 1030.

(*d*) 10 S. 178, affd. 6 W. & S. 229.

Sections 39—40.

incapacity on the part of them or any of them, preventing them carrying on their business, this Court will not interfere, but will leave the surviving partners to extricate their affairs in their own way:" *Young* v. *Collins* (1852—3) (*e*). This does not however derogate from the right of a partner to insist upon the realization of the partnership property by sale.

(3) "Where there is a surviving partner or partners, but these partners are unfitted either for carrying on or winding up the affairs of the partnership, whether from failure of duty, or incapacity of any one or more of them, then this Court can, and if satisfied of the necessity, will appoint a factor. All such cases are in their nature cases of circumstances; but if the circumstances are strong enough, it is within the competency of the Court to make the appointment." See also *Gow* v. *Schulze* (1877), and particularly the opinion of Lord Shand (*f*).

Principle of rules.

These rules are the application of the general principle that the Courts in Scotland do not assume the management of partnership or trust estates when the parties interested have provided adequate machinery, and will only appoint a judicial factor when the persons entrusted prove incapable or unreliable, or the rights or interests of parties are endangered, or the trust has become unworkable. See *Ewing* v. *Ewing* (1884) (*g*).

Effect of last clause of section.

The question arises whether the last clause of this section alters all this, and entitles any partner of a dissolved firm, or his representatives, disregarding the principles of the common law, to insist on the appointment of a judicial factor, notwithstanding that competent and trustworthy partners are ready to undertake the duty. The question is not free from doubt, but it is thought that the common law rules are not superseded. A partner may apply to the Court, but the Court will deal with the application on the lines of the common law, which are saved by section 46, *infra*.

Apportionment of premium where partnership prematurely dissolved.

40. Where one partner has paid a premium to another on entering into a partnership for a fixed term, and the partnership is dissolved before the expiration of that term otherwise than by the death of a partner, the Court may order the repayment of the premium, or of such part thereof as it thinks just, having regard to the terms of the partnership contract and to the length of time during which the partnership has continued; unless

(*a.*) the dissolution is, in the judgment of the Court, wholly or chiefly due to the misconduct of the partner who paid the premium, or

(*b.*) the partnership has been dissolved by an agreement containing no provision for a return of any part of the premium.

(*e*) 14 D. 540, revd. 1 Macq. 385.
(*f*) 4 R. 928 (933—4).
(*g*) 11 R. 600, *per* Lord President, 627—8.

"Partnership," pp. 64 *et seq.*

Section 40.

This section, according to a statement in the memorandum to the original bill, is intended to adopt the law laid down in the case of *Atwood* v. *Maude* (1868) (*c*). The existing cases on this subject are difficult to reconcile and the principles upon which the Court has hitherto acted were not well settled (*d*).

A partnership for a fixed term. The section does not deal with the case of a partnership at will; in such cases the parties must be taken to have run the risk of the partnership being determined at any time (*e*) and, apart from fraud no part of the premium will be returned, but a person who has received a premium for taking another into partnership with him would probably not be allowed to determine the partnership next day without cause and retain the premium (*f*).

If the partner who paid the premium was induced to enter into partnership by fraud or misrepresentation he will be entitled, on the contract being rescinded, to a lien on the partnership assets for the amount of the premium (see *infra*, § 41 (*a*)), in addition to his right to recover the premium from his co-partner to whom he paid it. Fraud.

Otherwise than by the death of a partner. This exception is in accordance with the previous law (*g*). Death is a contingency which all persons entering into a partnership know may unexpectedly determine it (see *supra*, § 33), so that if they do not guard against the risk they may reasonably be treated as content to incur it. Death.

It is conceived that these words will not prevent the Court in a proper case from ordering the repayment of the whole or part of the premium where a person knowing himself to be in a precarious state of health conceals the fact, and induces another to enter into partnership with him and pay him a premium, and shortly afterwards dies (*h*).

In all other cases except those mentioned in clauses (*a*) and (*b*), the Court has a discretion, and the Court of Appeal will not interfere with its exercise except on special grounds (*i*). In the exercise of this discretion attention must be paid to the terms of the partnership contract, and to the length of time during which the partnership has continued, and it would seem, under this section, that the Court is not to take other matters into consideration; if this be so the discretion of the Court will be more limited than has hitherto been the case (*k*). As a rule the part of the premium returned bears the same proportion to the whole premium as the unexpired part of the term bears to the whole term (*l*). Discretion.

(*c*) 3 Ch. 369.

(*d*) See "Partnership," pp. 66 *et seq.*

(*e*) See per Lord Eldon in *Tattersall* v. *Groote* (1800), 2 Bos. & P. 134.

(*f*) See *Featherstonhaugh* v. *Turner* (1858), 25 Beav. 382; *Hamil* v. *Stokes*, Dan. 20.

(*g*) See *Whincup* v. *Hughes* (1871), L. R. 6 C. P. 78; *Ferns* v. *Carr* (1885), 28 Ch. D. 409.

(*h*) *Mackenna* v. *Parkes*, 36 L. J. Ch. 366.

(*i*) *Lyon* v. *Tweddell* (1881), 17 Ch. Div. 529.

(*k*) See *Lyon* v. *Tweddell* (1881), 17 Ch. Div. 529.

(*l*) See *Atwood* v. *Maude* (1868), 3 Ch. 369.

Sections 40—41.

Clause (*a*).

That a partner whose conduct is the cause or chief cause of dissolution is not entitled to a return of any part of the premium paid by him has long been recognised as the law (*m*). The fact that the partner paying the premium is not altogether free from blame will not deprive him of his right to recover a portion of the premium (*n*).

Clause (*b*).

Clause (*b*) is also in accordance with the previous law (*o*). But if no definite agreement has been come to and the partners have merely consented to dissolve, it is presumed that the question of the return of the premium will remain open (*p*).

The decision of the Court upon the question whether any part of the premium is returnable or not, should be obtained at the hearing of the action (*q*).

Scotch Law.

Scotch Law. Apportionment of premium.

There is no trace of such a claim having been made in the Scotch Courts. But see claim sustained for repayment of disbursements made in promoting an object of common interest that proved abortive: *Dobie* v. *Lauder's Trustees* (1873) (*r*), and prior cases.

The repayment provided for in this section is by a partner, not by the firm; and it would not be allowed to come in competition with the claims of the firm's creditors.

Rights where partnership dissolved for fraud or misrepresentation.

41. Where a partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled—

(*a.*) to a lien on, or right of retention of, the surplus of the partnership assets, after satisfying the partnership liabilities, for any sum of money paid by him for the purchase of a share in the partnership and for any capital contributed by him, and is

(*b.*) to stand in the place of the creditors of the firm for any payments made by him in respect of the partnership liabilities, and

(*c.*) to be indemnified by the person guilty of the fraud or making the representation against all the debts and liabilities of the firm.

(*m*) *Airey* v. *Borham* (1861), 29 Beav. 620; *Atwood* v. *Maude* (1868), 3 Ch. 369; *Wilson* v. *Johnstone* (1873), 16 Eq. 606; *Bluck* v. *Capstick* (1879), 12 Ch. D. 863.

(*n*) *Astle* v. *Wright* (1856), 23 Beav. 77; *Pease* v. *Hewitt* (1862), 31 Beav. 22.

(*o*) *Lee* v. *Page* (1861), 30 L. J. Ch. 857.

(*p*) See *Astle* v. *Wright* (1856), 23 Beav. 77; *Wilson* v. *Johnstone* (1873), 16 Eq. 606; *Bury* v. *Allen* (1844), 1 Coll. 589.

(*q*) *Edmonds* v. *Robinson* (1885), 29 Ch. D. 170.

(*r*) 11 Mc. 749.

Sections 41—42.

"Partnership," pp. 482 *et seq.*

This section is in accordance with the previous law (*s*), and settles the question left open by the House of Lords in *Adam* v. *Newbigging* (1888) (*t*), as to the extent of the indemnity to which a person, who has been induced to enter into a partnership by misrepresentation apart from fraud, is entitled, in accordance with the decision of the Court of Appeal in that case (*u*).

Without prejudice to any other right. This section does not deal with the right of the defrauded party to make the persons guilty of the misrepresentation personally liable for the monies mentioned in clause (*a*) (*x*); nor with his right in cases of fraud to recover any damages to which he may be entitled (*y*).

Interest.

In *Mycock* v. *Beatson* (1879) (*z*), the plaintiff was declared entitled to a lien on the partnership assets for interest at the rate of 5 per cent. on the sum paid by him for his share in the partnership as well as for that sum itself, and also for the costs of the action. In *Newbigging* v. *Adam* (1887) interest at the rate of 4 per cent. was allowed (*a*). It is conceived that the Court may still allow interest in such cases and declare the plaintiff entitled to a lien for that interest and for his costs.

The Court is often called upon to rescind other contracts between partners besides those for the formation of a partnership, and more especially agreements entered into on or after a dissolution. The principles upon which the Court acts in such cases will be found in "Partnership," pp. 484 *et seq.*, and the cases there collected and discussed.

Scotch Law.

Scotch Law.

There is no direct authority in the law of Scotland, but the principles of *Adam* v. *Newbigging* (1887), *supra*, and prior cases appear to be in harmony with that law (*b*).

Right of outgoing partner in certain cases to share profits made after dissolution.

42.—(1.) Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner or his estate, then, in the absence of any agreement to the contrary, the outgoing partner

(*s*) *Pillans* v. *Harkness*, Colles, 442; *Rawlins* v. *Wickham* (1858), 1 Giff. 355, and 3 De G. & J. 304; *Mycock* v. *Beatson* (1879), 13 Ch. D. 384.

(*t*) 13 App. Ca. 308.

(*u*) 34 Ch. Div. 582.

(*x*) See the cases in the last three notes.

(*y*) That the relief mentioned in this section may not in every case cover all the damages to which he is entitled, see the judgments of the Court of Appeal in *Newbigging* v. *Adam* (1887), 34 Ch. Div. 582.

(*z*) 13 Ch. D. 384.

(*a*) See 34 Ch. Div. p. 585; the order in this case does not appear to have contained any declaration as to the right of lien.

(*b*) Clark, 256—57.

Section 42.

or his estate is entitled at the option of himself or his representatives to such share of the profits made since the dissolution as the Court may find to be attributable to the use of his share of the partnership assets, or to interest at the rate of five per cent. per annum on the amount of his share of the partnership assets.

(2.) Provided that where by the partnership contract an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and that option is duly exercised, the estate of the deceased partner, or the outgoing partner or his estate, as the case may be, is not entitled to any further or other share of profits; but if any partner assuming to act in exercise of the option does not in all material respects comply with the terms thereof, he is liable to account under the foregoing provisions of this section.

"Partnership," pp. 521 *et seq.*

This section deals with the liability of the surviving partners, as partners, towards a retired partner or the estate of a deceased partner, and is in accordance with the previous law (*c*); it does not touch the liability of partners, who are also the executors of a deceased partner, towards the persons interested in their testator's estate in their character of executors. The cases on this subject will be found in "Partnership," pp. 528 *et seq.*

SUB-SECTION 1.

Sub-section (1).

In the absence of any agreement.—If there be any agreement the liability of the continuing partners will be regulated thereby (*d*). If the executors of the deceased partner, not themselves being members of the firm, lend their testator's share in the assets of the partnership to the continuing partners at interest, the continuing partners will only be liable for interest and not for profits although they know that the money so lent belongs to the testator's estate and that the loan is unauthorised (*e*).

Option.

At the option of himself or his representatives.—The persons having the option are entitled to have such enquiries and accounts as will enable them

(*c*) See *Crawshay* v. *Collins* (1808), 15 Ves. 218; 1 J. & W. 267, & 2 Russ. 325; *Booth* v. *Parks*, 1 Moll. 465, and Beatty 444; *Vyse* v. *Foster* (1874), L. R. 7 H. L. at p. 329, and other cases cited, "Partnership," pp. 526 *et seq.*

(*d*) *Vyse* v. *Foster* (1874), 8 Ch. 309; L. R. 7 H. L. 318.

(*e*) *Stroud* v. *Gwyer* (1860), 28 Beav. 130. If, in such a case the executors are members of the firm it appears doubtful whether the persons interested in the testator's estate have or have not an option between profits and interest, se *Vyse* v. *Foster*, 8 Ch. p. 334.

to exercise their option (*f*), but they are only entitled to profits or interest and not both, nor partly to one and partly to the other (*g*).

Share of profits.

Such share of the profits, &c., &c.—It is often a matter of much difficulty to ascertain how much of the profits made since the dissolution is attributable to the use of a retired or deceased partner's share in the assets and how much is attributable to the skill and conduct of the continuing partners. Every case must depend on its own circumstances and as pointed out by Wigram, V.-C. in *Willett* v. *Blanford* (1841) (*h*), "the nature of the trade, the manner of carrying it on, the capital employed, the state of the account between the late partnership and the deceased partner at the time of his death, and the conduct of the parties after his death may materially affect the rights of the parties." It was by taking into consideration such facts as these that in the cases of *Simpson* v. *Chapman* (1853) (*i*), and *Wedderburn* v. *Wedderburn* (1836) (*k*), the continuing partners were held not liable to account for profits made after dissolution. The proportion in which profits were divided before the dissolution appears to have little or no bearing on this question (*l*).

Remuneration to continuing partners.

This section is silent as to the allowance of any remuneration to the continuing partners for their trouble in carrying on the business and earning the profits; it has been usual in such cases to allow remuneration (*m*), unless the partner claiming it is a trustee and guilty of a breach of trust (*n*). It is submitted that in a proper case the Court will still be able to make such allowances (see § 46).

Interest.

Interest at five per cent. per annum; this is simple interest. If the partners are also trustees and bound to accumulate, compound interest may be charged against them (*o*), but the liability to compound interest is a liability *qua* trustee and not *qua* partner and is therefore beyond the scope of this section.

Parties to action.

The proper persons to bring an action against the continuing partners for the share of the deceased partner are the executors, but if they stand in such a position with regard to the surviving partners that they cannot fairly prosecute the rights of the parties interested in their testator's estate, the persons so interested may sue (*p*).

(*f*) *Vyse* v. *Foster* (1872), 8 Ch. p. 334.

(*g*) *Vyse* v. *Foster* (1874), L. R. 7 H. L. p. 336.

(*h*) 1 Hare, 253, at p. 272.

(*i*) 4 De G. M. & G. 154.

(*k*) 2 Keen, 722; 4 M. & Cr. 41; and 22 Beav. 84.

(*l*) *Yates* v. *Finn* (1880), 13 Ch. D. 843.

(*m*) *Yates* v. *Finn* (1880), 13 Ch. D. 839, and other cases cited, "Partnership," p. 528.

(*n*) *Stocken* v. *Dawson* (1845), 6 Beav. 371, and 9 Beav. 247, and "Partnership," p. 528.

(*o*) See *Jones* v. *Foxall* (1852), 15 Beav. 388, and "Partnership," p. 531.

(*p*) *Travis* v. *Milne* (1851), 9 Hare, 141; *Beningfield* v. *Baxter* (1887), 12 App. Ca. pp. 178—179.

Section 42.

Scotch Law.

SCOTCH LAW.

Outgoing partner's assets left in firm.

This is the existing law, *Laird* v. *Laird* (1855) (*q*). In the two earlier cases of *Minto* v. *Kirkpatrick* (1833) (*r*) and *McMurray* (1852) (*s*), the Court (in the latter case being much divided) awarded only five per cent. interest, on the ground that the claim being by a child of the deceased partner for *legitim*, which was a debt of the deceased's estate as at his death, no more than legal interest was due. The principles given effect to in *Laird*, *supra*, were also applied where two partners, being trustees of a third party (not a deceased partner), employed the trust funds in the business; and it was held that, in ascertaining the profits made on the trust funds, there must be taken into account, not only the input capital of all the partners, but funds obtained on loan or otherwise and invested in the partnership business; and that the proportion which the trust monies in the business bore to the whole funds so employed regulated the share of profits to be paid to the beneficiaries under the trust: *Cochrane* v. *Black* (1855–57) (*t*). In this case the rate of interest to which, as an alternative to profit, beneficiaries were entitled, in the case of a trustee dealing with the estate for his own behoof, was stated by Lord Wood as "five per cent. or four per cent. according to circumstances,—five per cent. being the lowest rate when the funds have been embarked in trade,—the law presuming that every business yielded a profit to that amount" (*u*).

SUB-SECTION 2.

Sub-section (2).

The proviso contained in the second sub-section of this section is in accordance with the statement of the law by Lord Cairns in *Vyse* v. *Foster* (1874) (*x*). It deals with the case of an option to purchase, as in *Willett* v. *Blanford* (1841) (*y*), and not with an executed contract to purchase, which was the case in *Vyse* v. *Foster* (1874) (*z*). In the latter case the continuing partners will not in the absence of fraud be liable to account for profits, unless by neglecting to fulfil some condition, or not complying with some stipulation of the essence of the contract, or otherwise, they repudiate or give the representatives of the deceased partner a right to rescind the contract (*a*).

As to the construction of clauses giving an option of purchase, see "Partnership," pp. 423 *et seq.*, and 429 *et seq.*

As to the evidence upon which accounts are taken, see "Partnership," pp. 536 *et seq.*

The amount due from the continuing partners under this section is a debt (see *infra*, § 43 and notes), and the liability is therefore joint in England and joint and several in Scotland (see *supra*, § 9).

(*q*) 17 D. 984.
(*r*) 11 S. 632.
(*s*) 14 D. 1048.
(*t*) 17 D. 321; 19 D. 1019.
(*u*) 17 D. 331, foot.
(*x*) L. R. 7 H. L. p. 329.
(*y*) 1 Ha. 253.
(*z*) 8 Ch. 309, and L. R. 7 H. L. 318, see p. 337.
(*a*) See per Lord Cairns, L. R. 7 H. L. pp. 334, 335.

43. Subject to any agreement between the partners, the amount due from surviving or continuing partners to an outgoing partner or the representatives of a deceased partner in respect of the outgoing or deceased partner's share is a debt accruing at the date of the dissolution or death.

Retiring or deceased partner's share to be a debt.

This section is in accordance with the previous law (*b*). The surviving or continuing partners not being trustees, the Statute of Limitations will run in their favour from the date of the dissolution or death (*c*), and their liability will be joint in England and joint and several in Scotland (see § 9). If in addition to being partners they are trustees, or liable as trustees, the statute will still run in their favour, except in the cases mentioned in the Trustee Act, 1888 (*d*), but their liability to account to their *cestuis que trustent* will be joint and several.

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SCOTCH LAW.

This section proceeds on the footing that there is no winding up, but that by contract, the value of a deceased or retiring partner's share is to be ascertained and paid out. Accordingly the date, unless otherwise stipulated, at which the value falls to be ascertained will be the date of dissolution. The amount thus becomes a debt bearing interest from that date. This was illustrated in *Ewing and Co.* v. *Ewing* (1882) (*e*), where, however, the amount was payable by instalments, and a question arose as to interest. See also Bell's Commentaries (*f*). But where a deceased partner's share was to be paid out according to the prior balance, and the firm became totally insolvent between the date of that balance and the partner's death, it was held that the firm was not liable for the value of the deceased partner's share as ascertained by the prior balance: *Blair* v. *Douglas Heron & Co.* (1776-77) (*g*).

44. In settling accounts between the partners after a dissolution of partnership, the following rules shall, subject to any agreement, be observed:

Rule for distribution of assets on final settlement of accounts.

(*a.*) Losses, including losses and deficiences of capital, shall be paid first out of profits, next out of capital, and lastly, if necessary, by the partners individually in the proportion in which they were entitled to share profits:

(*b*) *Knox* v. *Gye* (1871), L. R. 5 H. L. 656.

(*c*) See ib. and "Partnership," pp. 508 *et seq.*

(*d*) 51 & 52 Vict. c. 59, § 8.

(*e*) 10 R. (H. L.) 1, 8 App. Ca. 822, per Lord Young, p. 3, and Lord Bramwell, pp. 9—10.

(*f*) 2. 535.

(*g*) M. 14,577, Affd. 6 Paton, 796.

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(*b.*) The assets of the firm including the sums, if any, contributed by the partners to make up losses or deficiences of capital, shall be applied in the following manner and order :

1. In paying the debts and liabilities of the firm to persons who are not partners therein :
2. In paying to each partner rateably what is due from the firm to him for advances as distinguished from capital :
3. In paying to each partner rateably what is due from the firm to him in respect of capital :
4. The ultimate residue, if any, shall be divided among the partners in the proportion in which profits are divisible.

"Partnership," pp. 401 *et seq.*

This section follows almost word for word the statement of the law n "Partnership," p. 402, and the cases there quoted may be referred to to illustrate and explain the present section. It is open to partners to modify the rules contained in this section by agreement.

It should be remembered that, in the absence of any agreement, partners are entitled to share profits and are bound to contribute to losses, whether of capital or otherwise, equally. See *supra*, § 24 (1).

As to what advances a partner is entitled to be repaid by the firm, and to his right to interest thereon, see *supra*, § 24 (3).

As to the right of a partner to have the partnership assets applied in the way mentioned in this section, see *supra*, § 39.

Scotch Law.

SCOTCH LAW. Distribution of assets and losses.

This section appears to be in conformity with legal principle and practice in Scotland (*h*). In the case of loss the principle is tested where one partner contributes all the capital, and yet the profits are shared equally. In that case any undivided profits would, in the first place, be applied in meeting losses. This would fall equally on both partners. Then the whole capital of the monied partner would be absorbed, there being no corresponding contribution by the other partner. Lastly the other funds of both partners would be put under equal contribution.

(*h*) Erskine, III. 3, 27 ; 2 Bell's Com. 535.

Supplemental.

45. In this Act, unless the contrary intention appears,— Definitions of "court" and "business."

The expression "court" includes every court and judge having jurisdiction in the case:

The expression "business" includes every trade, occupation, or profession.

Court.—By section 34 (3) of the Judicature Act, 1873 (36 & 37 Vict. c. 66), all causes and matters for the dissolution of partnerships or the taking of partnership and other accounts, are assigned to the Chancery Division of the High Court of Justice, but this is subject to any arrangement which may be made by any rules of Court or orders of transfer to be made under the authority of the Act. (See § 33.) Chancery Division.

By the Chancery of Lancaster Act, 1890 (53 & 54 Vict. c. 23, § 3), the Court of Chancery of the County Palatine of Lancaster has, as regards persons and property subject to its jurisdiction, similar powers and jurisdiction to those exercised by the Chancery Division of the High Court. County Palatine of Lancaster.

By the County Courts Act, 1888 (51 & 52 Vict. c. 43, § 67), the County Court is empowered to exercise all the powers and authority of the High Court in actions or matters for the dissolution or winding up of any partnership in which the whole property, stock and credits of the partnership do not exceed in amount or value the sum of £500. If during the progress of any action or matter it should appear that the value of the partnership property exceeds this amount, it is the duty of the judge to direct the action to be transferred to the Chancery Division of the High Court; but it is open to any party to apply to a judge of the Chancery Division in chambers for an order directing the action or matter to be carried on in the County Court notwithstanding such excess, and the Judge may make an order for this purpose (see § 68). If any action or matter is pending in the Chancery Division which might have been commenced in the County Court, any party may apply to the Judge of the Chancery Division, to whom the action or matter is attached, to have the same transferred to the County Court, and the judge may upon such application, or without it if he should think fit, order this to be done (see § 69). County Court.

For the power of the Judge in Lunacy to dissolve a partnership in the case of the lunacy of a partner, see the Lunacy Act, 1890 (53 Vict. c. 5, §§ 108, 119 & 341), and *supra*, § 35, p. 86. Judge in Lunacy.

Business.—The meaning of the word business has often come before the Courts, both in connection with § 4 of the Companies Act, 1862 (*h*), and with restrictive covenants against carrying on any business (*i*). The meaning

(*h*) See *Harris* v. *Amery* (1865), L. R. 1 C. P. at p. 155; *Smith* v. *Anderson* (1880), 15 Ch. Div. 247, and other cases cited in Lindley on the Law of Companies, p. 114.

(*i*) See *Rolls* v. *Miller* (1884), 27 Ch. Div. 71; *Bramwell* v. *Lacy* (1879), 10 Ch. D. 691, and other cases

Section 45.

of the word in this Act is very wide, but probably not wider than its ordinary meaning as given in dictionaries (*k*).

Interpretation Act, 1889.

By the Interpretation Act, 1889 (52 & 53 Vict. c. 63), the following words, which occur in the present Act, have the meanings mentioned below, unless a contrary intention appears.

Masculine. Singular.

Words importing the masculine gender include females, and words in the singular include the plural, and words in the plural include the singular (52 & 53 Vict. c. 63, § 1).

County Court.

"County Court" means, as respects England and Wales, a Court under the County Courts Act, 1888 (*ib.* § 6), and, as respects Ireland, a civil bill Court within the meaning of the County Officers and Courts (Ireland) Act, 1877 (*ib.* § 29).

High Court.

"High Court," when used with reference to England or Ireland, means Her Majesty's High Court of Justice in England or Ireland, as the case may be (*ib.* § 13 (3)).

Land.

"Land" includes messuages, tenements and hereditaments, houses and buildings of any tenure (*ib.* § 3).

Person.

"Person" includes any body of persons corporate or incorporate (*ib.* § 19).

Writing.

"Writing." Expressions referring to writing shall be construed as including references to printing, lithography, photography, and other modes of representing or reproducing words in a visible form (*ib.* § 20).

Scotch Law.

Scotch Law. Court.

The sections of the statute in which the "Court" is mentioned are 35, 39, 40 and 42.

Dissolution.

Section 35.—Under this section, on an application by a partner, the Court may decree a dissolution of the partnership in any of the cases specified. There is no trace of any such jurisdiction having been exercised by the Sheriff Court. Such applications generally take the form of a petition to the Court of Session (Junior Lord Ordinary) for the appointment of a judicial factor to wind up the partnership estate: *Macpherson* v. *Richmond* (1869), *Eadie* v. *MacBean's Curator bonis* (1885) (*l*); and the Sheriff Court has not jurisdiction to appoint judicial factors in partnership estates. The Judicial Factors (Scotland) Act, 1880 (*ll*), from which the Sheriff Court jurisdiction in the appointment of judicial factors (with a single exception) flows, declares judicial factor to mean *factor loco tutoris* and *curator bonis*. Again, if the action take the form of a declarator (as was suggested in the case of *Eadie*) (*m*), it would be incompetent in the Sheriff Court, as not falling within the Sheriff Court (Scotland) Act, 1877 (*n*).

Form of action to dissolve firm.

Although questions of this kind have been disposed of under petitions to the Court for the appointment of a judicial factor to wind up a partnership

collected in Kerr on Injunctions (3rd edition), p. 441.

(*k*) See per Jessel, M.R., in *Smith* v. *Anderson* (1880), 15 Ch. Div. p. 258.

(*l*) 41 Scot. Jurist, 288; 12 R. 660.

(*ll*) 43 & 44 Vict. c. 4, §§ 3 & 4.

(*m*) 12 R. 665, 669.

(*n*) 40 & 41 Vict. c. 50, § 3; see *Wilson* v. *Co-operative Store Co.* (1885), 13 R. 21.

concern, an action of declarator, with conclusion for dissolution, appears to be the more appropriate form of procedure. On the dissolution being decreed there may be no need for a judicial winding up, if there be surviving, competent and reliable partners willing to undertake the work. See notes on section 39, *supra*, p. 103. Section 46.

See Mackay's Court of Session Practice (*o*) and Dove Wilson's Sheriff Court Practice (*p*).

Section 39.—The Court in this case is the Court of Session (Junior Lord Ordinary). Winding up.

Sections 40 *and* 42.—Actions under these sections will be competent both in the Sheriff Court and in the Court of Session. Apportionment of premium. Accounting for profits.

46. The rules of equity and of common law applicable to partnership shall continue in force except so far as they are inconsistent with the express provisions of this Act. Saving for rules of equity and common law.

A similar provision is found in the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61, § 97 (2)); the object of such a section is to meet cases not dealt with by the other sections of the Act (*q*).

It may be convenient here to give a short summary of the changes introduced into English law by the present Act, and of the doubtful points which have been settled by it.

Changes in English Law.

Section 23 introduces a new method of making a partner's share in the partnership assets available for the payment of his separate judgment debts. See *supra*, pp. 57 *et seq.* See also § 33 (2). Section 23.

Probably the assignment or mortgage by a partner of his share in the partnership assets does not in any case dissolve the partnership nor give the other partners a right to dissolve. See *supra*, pp. 77 *et seq.* Section 31.

The power of the Court to decree the dissolution of a partnership is extended by § 33 (*f*) and perhaps also by § 33 (*c*). See *supra*, pp. 91 *et seq.* Section 35.

It is doubtful whether the doctrine of holding out has been extended by the words "knowingly suffers" in §§ 14 (1) and 38. See *supra*, p. 38. Section 14.

Possibly § 15 has made the admissions of a partner concerning the partnership affairs made in the ordinary course of business evidence against his co-partners in criminal cases. See *supra*, p. 41. Section 15.

Section 16 may have made notice to a partner who habitually acts in the partnership business notice to the firm, though he was not acting in the partnership business when he received the notice. See *supra*, p. 41. Section 16.

Doubtful Points Settled.

A servant remunerated by a share of profits has a right to an account. See *supra*, pp. 20 & 21. Section 2 (3) (*b*).

(*o*) I. Ch. XI.
(*p*) Ch. II. & III.
(*q*) *In re Gillespie*, 18 Q. B. D 286, at pp. 292—293.

Section 46. A partner who has in fact no authority to bind the firm will not bind it by dealings with a person who does not know or believe him to be a partner. See *supra*, p. 27.

Section 5.

Section 7. A person who takes a partnership security from a partner in discharge of a separate claim against him, cannot make the firm liable by proving that he believed the partner had authority to give the security. See *supra*, p. 29.

Section 8. An act done by one partner in contravention of an agreement between the partners is not binding on the firm in respect of persons who have notice of the agreement. See *supra*, p. 30.

Section 10. An action in deceit for damages will lie against the firm for the fraud of a partner committed in the ordinary course of the partnership business. This was perhaps doubtful. See *supra*, pp. 33 & 34.

Section 24. Section 24 (8) settles the powers of a majority of partners to bind the minority. See *supra*, p. 68.

Section 26. A partnership constituted by deed may be dissolved by a notice in writing. See *supra*, p. 71.

Section 31. Section 31 settles the extent of the right to an account enjoyed by the assignee of a partner's share in the partnership. See *supra*, pp. 76 *et seq.*

Section 35 (*a*). A decree for the final dissolution of a partnership on the ground of the insanity of a partner may be made in an action commenced by the next friend of the partner of unsound mind. See *supra*, p. 86.

Section 38. Section 38 settles the extent of the authority of a partner to bind the firm after the dissolution of the partnership. See *supra*, p. 100.

Section 40. The rules upon which a Court is to act in apportioning a premium where a partnership has been prematurely dissolved are settled by § 40. See *supra*, p. 104.

Section 41. The indemnity to which a person, who has been induced to enter into partnership by fraud or misrepresentation, is entitled is settled by § 41. See *supra*, p. 106.

Scotch Law.

Scotch Law.

Who may be a partner. By the Interpretation Act, 1890, 52 & 53 Vict. c. 63, § 19, "person," it is declared, "shall, unless the contrary intention appears, include any body of persons corporate or unincorporate." It would appear, therefore, that companies and firms can, if allowed by their own constitutions, enter into partnerships, and this is in accordance with the law as stated by Professor Bell. "One company frequently becomes a member of another company. This is quite legal" (*r*). See *Fraser* v. *City of Glasgow Bank* (1879) (*s*), *Gillespie and Paterson* v. *same* (1879) (*t*).

Another company or firm.

Minor. Any person of sound mind may become a partner with others. A pupil, being incapable of consent, cannot be a partner, but a minor may with consent of his curators, if he has such, if not by his own act; subject, however, to the protection which the law affords by an action of reduction

(*r*) 2 Bell's Com. 574.
(*s*) 6 R. 1259.
(*t*) 6 R. 714.

within the *quadriennium utile* (*u*): *Hill* v. *City of Glasgow Bank* (1879) (*x*), and prior cases. Section 47.

As to married women, see *supra*, § 35 (*b*), pp. 89 *et seq.* Married woman.
See also under sections 9 and 39.

47.—(1.) In the application of this Act to Scotland the bankruptcy of a firm or of an individual shall mean sequestration under the Bankruptcy (Scotland) Acts, and also in the case of an individual the issue against him of a decree of cessio bonorum. Provision as to bankruptcy in Scotland.

(2.) Nothing in this Act shall alter the rules of the law of Scotland relating to the bankruptcy of a firm or of the individual partners thereof.

Scotch Law.

SUB-SECTION 1.

It would be out of place here to deal with the various questions arising on the bankruptcy of firms and partners in Scotland. Bankruptcy is defined to mean (1) sequestration under the Bankruptcy Scotland Acts, whether of the individual or of a partner; and (2) the issue of a decree of *cessio bonorum* against an individual. Cessio of a firm is not included, though it is believed to be competent, the term "debtor" bearing the same meaning under the Cessio as under the Bankruptcy Acts; and "Cessio is in practice a not uncommon mode of liquidating small trading firms" (*y*). The only part of the statute where bankruptcy is specially mentioned is § 33, sub-section (1), where it is enacted that subject to any agreement to the contrary every partnership is dissolved by the bankruptcy of any partner. Scotch Law. Sub-section (1). Definition of bankruptcy.

SUB-SECTION 2.

A firm may be sequestrated while the partners or some of them remain solvent, and conversely one or more partners may be sequestrated while the firm remains solvent. The sequestrations of the firm and partners are separate proceedings. The most important point is the ranking of creditors. The leading rules may be deduced from the doctrine of the separate *persona* of the firm, and the liability of the individual partners as co-obligants or cautioners for the firm debts; and may be stated thus:— Sub-section (2). Rules for ranking creditors on firm and partner's estates.

1. In the sequestration of the firm, the firm's creditors rank on the firm estate for the full amount of their debts, to the exclusion of the separate creditors of the partners.

2. They may also rank, along with the private creditors of the partners, on the individual estates of the partners, for the balance of the firm debt, after valuing and deducting the claim against the firm estate, and the claim

(*u*) Erskine, I. 7, 38.
(*x*) 7 R. 68.
(*y*) Goudy on Bankruptcy, p. 441.

Sections 47—50.

against the other partners, so far as they may be liable to relieve the bankrupt partner.

3. But such a claim on a partner's estate can only be made by proper creditors of the firm, and not by a creditor who is also a partner.

4. Again, in the bankruptcy of a partner the firm may rank on his estate for any sum due in respect of contribution of capital, over-drafts or otherwise; and if the firm be itself bankrupt its trustee may so rank on the partner's estate; and that without prejudice in the latter case to the firm's creditors claiming under rule 2, *supra*.

5. Where a firm is bankrupt the partners have no claim on its estate for over-advances, but only on each other's private estates for the balance due in a mutual accounting.

6. In the bankruptcy of a partner his creditors have a claim against the firm, for his share and interest in the concern after deduction of debts.

On this subject generally, see Bell's Commentaries (*a*), and Goudy on Bankruptcy (*b*).

Repeal.

48. The Acts mentioned in the schedule to this Act are hereby repealed to the extent mentioned in the third column of that schedule.

Commencement of Act.

49. This Act shall come into operation on the first day of January one thousand eight hundred and ninety-one.

Short title.

50. This Act may be cited as the Partnership Act, 1890.

SCHEDULE.

Section 48.

ENACTMENTS REPEALED.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
19 & 20 Vict. c. 60 .	The Mercantile Law Amendment (Scotland) Act, 1856.	Section seven (*c*).
19 & 20 Vict. c. 97 .	The Mercantile Law Amendment Act, 1856.	Section four (*c*).
28 & 29 Vict. c. 86 .	An Act to amend the law of partnership.	The whole Act (*d*).

(*a*) II. 547 *et seq.*
(*b*) 560 *et seq.*
(*c*) See *supra*, § 18.
(*d*) See *supra*, §§ 2 (3), (*b*), (*c*) (*d*), (*e*), and 3.

APPENDIX I.

PARTNERSHIP ACT, 1890.

53 & 54 VICT. CAP. 39.

ARRANGEMENT OF SECTIONS.

Nature of Partnership

Sections 1—2.

Dissolution of Partnership and its consequences.

Supplemental.

An Act to declare and amend the Law of Partnership.

[14th *August* 1890.

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Nature of Partnership.

Definition of partnership.
[Pp. 13—16.]

1.—(1.) Partnership is the relation which subsists between persons carrying on a business in common with a view of profit.

(2.) But the relation between members of any company or association which is—

25 & 26 Vict. c. 89.

(*a.*) Registered as a company under the Companies Act, 1862, or any other Act of Parliament for the time being in force and relating to the registration of joint stock companies ; or

(*b.*) Formed or incorporated by or in pursuance of any other Act of Parliament or letters patent, or Royal Charter ; or

(*c.*) A company engaged in working mines within and subject to the jurisdiction of the Stannaries :

is not a partnership within the meaning of this Act.

Rules for determining existence of partnership.
[Pp. 16—22.]

2. In determining whether a partnership does or does not exist, regard shall be had to the following rules :

(1.) Joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof

(2.) The sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived.

(3.) The receipt by a person of a share of the profits of a business is *primâ facie* evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business; and in particular—

(*a.*) The receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of a business does not of itself make him a partner in the business or liable as such:

(*b.*) A contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business does not of itself make the servant or agent a partner in the business or liable as such:

(*c.*) A person being the widow or child of a deceased partner, and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner, is not by reason only of such receipt a partner in the business or liable as such:

(*d.*) The advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such. Provided that the contract is in writing, and signed by or on behalf of all the parties thereto:

(*e.*) A person receiving by way of annuity or otherwise a portion of the profits of a business in consideration of the sale by him of the goodwill of the business is not by reason only of such receipt a partner in the business or liable as such.

Postponement of rights of person lending or selling in consideration of share of profits in case of insolvency.

3. In the event of any person to whom money has been advanced by way of loan upon such a contract as is mentioned in the last foregoing section, or of any buyer of a goodwill in consideration of a share of the profits of the business, being adjudged a bankrupt, entering into an arrangement to pay his creditors less than twenty shillings in the pound, or dying in insolvent circumstances, the lender of the loan shall not be entitled to recover anything in respect of his loan, and the seller of the goodwill shall not be entitled to recover anything in respect of the share of profits contracted for, until the claims of the other creditors of the borrower or buyer for valuable consideration in money or money's worth have been satisfied.

[P. 22.]

Meaning of firm.

4.—(1.) Persons who have entered into partnership with one another are for the purposes of this Act called collectively a firm, and the name under which their business is carried on is called the firm-name.

[Pp. 22—25.]

(2.) In Scotland a firm is a legal person distinct from the partners of

Sections 4—12.

whom it is composed, but an individual partner may be charged on a decree or diligence directed against the firm, and on payment of the debts is entitled to relief *pro ratâ* from the firm and its other members.

Relations of Partners to persons dealing with them.

Power of partner to bind the firm.
[Pp. 26—28.]

5. Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner.

Partners bound by acts on behalf of firm.
[Pp. 28, 29.]

6. An act or instrument relating to the business of the firm and done or executed in the firm-name, or in any other manner showing an intention to bind the firm, by any person thereto authorised, whether a partner or not, is binding on the firm and all the partners.

Provided that this section shall not affect any general rule of law relating to the execution of deeds or negotiable instruments.

Partner using credit of firm for private purposes.
[Pp. 29, 30.]

7. Where one partner pledges the credit of the firm for a purpose apparently not connected with the firm's ordinary course of business, the firm is not bound, unless he is in fact specially authorised by the other partners; but this section does not affect any personal liability incurred by an individual partner.

Effect of notice that firm will not be bound by acts of partner.
[Pp. 30, 31.]

8. If it has been agreed between the partners that any restriction shall be placed on the power of any one or more of them to bind the firm, no act done in contravention of the agreement is binding on the firm with respect to persons having notice of the agreement.

Liability of partners.
[Pp. 31—33.]

9. Every partner in a firm is liable jointly with the other partners, and in Scotland severally also, for all debts and obligations of the firm incurred while he is a partner; and after his death his estate is also severally liable in a due course of administration for such debts and obligations, so far as they remain unsatisfied, but subject in England or Ireland to the prior payment of his separate debts.

Liability of the firm for wrongs.
[Pp. 33, 34.]

10. Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act.

Misapplication of money or property received for or in custody of the firm.
[P. 35.]

11. In the following cases; namely—

(*a.*) Where one partner acting within the scope of his apparent authority receives the money or property of a third person and misapplies it; and

(*b.*) Where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm;

the firm is liable to make good the loss.

Liability for wrongs joint and several.
[P. 36.]

12. Every partner is liable jointly with his copartners and also severally for everything for which the firm while he is a partner therein becomes liable under either of the two last preceding sections.

Sections 13—20.

13. If a partner, being a trustee, improperly employs trust-property in the business or on the account of the partnership, no other partner is liable for the trust-property to the persons beneficially interested therein :

Improper employment of trust-property for partnership purposes.

[Pp. 36, 37.]

Provided as follows :—

(1.) This section shall not affect any liability incurred by any partner by reason of his having notice of a breach of trust ; and

(2.) Nothing in this section shall prevent trust money from being followed and recovered from the firm if still in its possession or under its control.

Persons liable by "holding out."

[Pp. 38—40.]

14.—(1.) Every one who by words spoken or written or by conduct represents himself, or who knowingly suffers himself to be represented, as a partner in a particular firm, is liable as a partner to any one who has on the faith of any such representation given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made.

(2.) Provided that where after a partner's death the partnership business is continued in the old firm-name, the continued use of that name or of the deceased partner's name as part thereof shall not of itself make his executors or administrators estate or effects liable for any partnership debts contracted after his death.

Admissions and representations of partners.

[Pp. 40, 41.]

15. An admission or representation made by any partner concerning the partnership affairs, and in the ordinary course of its business, is evidence against the firm.

Notice to acting partner to be notice to the firm.

[Pp. 41, 42.]

16. Notice to any partner who habitually acts in the partnership business of any matter relating to partnership affairs operates as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner.

Liabilities of incoming and outgoing partners.

[Pp. 42—46.]

17.—(1.) A person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of the firm for anything done before he became a partner.

(2.) A partner who retires from a firm does not thereby cease to be liable for partnership debts or obligations incurred before his retirement.

(3.) A retiring partner may be discharged from any existing liabilities, by an agreement to that effect between himself and the members of the firm as newly constituted and the creditors, and this agreement may be either express or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted.

Revocation of continuing guaranty by change in firm.

[Pp. 46—48.]

18. A continuing guaranty or cautionary obligation given either to a firm or to a third person in respect of the transactions of a firm is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or of the firm in respect of the transactions of which, the guaranty or obligation was given.

Relations of Partners to one another.

Variation by consent of terms of partnership.

[Pp. 49, 50.]

19. The mutual rights and duties of partners, whether ascertained by agreement or defined by this Act, may be varied by the consent of all the partners, and such consent may be either express or inferred from a course of dealing.

Partnership property.

[Pp. 50—54.]

20.—(1.) All property and rights and interests in property originally

Sections 20—24.

brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of the partnership business, are called in this Act partnership property, and must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement.

(2.) Provided that the legal estate or interest in any land, or in Scotland the title to and interest in any heritable estate, which belongs to the partnership shall devolve according to the nature and tenure thereof, and the general rules of law thereto applicable, but in trust, so far as necessary, for the persons beneficially interested in the land under this section.

(3.) Where co-owners of an estate or interest in any land, or in Scotland of any heritable estate, not being itself partnership property, are partners as to profits made by the use of that land or estate, and purchase other land or estate out of the profits to be used in like manner, the land or estate so purchased belongs to them, in the absence of an agreement to the contrary, not as partners, but as co-owners for the same respective estates and interests as are held by them in the land or estate first mentioned at the date of the purchase.

Property bought with partnership money.

[Pp. 54, 55.]

21. Unless the contrary intention appears, property bought with money belonging to the firm is deemed to have been bought on the account of the firm.

Conversion into personal estate of land held as partnership property.

[Pp. 55—57.]

22. Where land or any heritable interest therein has become partnership property, it shall, unless the contrary intention appears, be treated as between the partners (including the representatives of a deceased partner), and also as between the heirs of a deceased partner and his executors or administrators, as personal or moveable and not real or heritable estate.

Procedure against partnership property for a partner's separate judgment debt.

[Pp. 57—60.]

23.—(1.) After the commencement of this Act a writ of execution shall not issue against any partnership property except on a judgment against the firm.

(2.) The High Court, or a judge thereof, or the Chancery Court of the county palatine of Lancaster, or a county court, may, on the application by summons of any judgment creditor of a partner, make an order charging that partner's interest in the partnership property and profits with payment of the amount of the judgment debt and interest thereon, and may by the same or a subsequent order appoint a receiver of that partner's share of profits (whether already declared or accruing), and of any other money which may be coming to him in respect of the partnership, and direct all accounts and inquiries, and give all other orders and directions which might have been directed or given if the charge had been made in favour of the judgment creditor by the partner, or which the circumstances of the case may require.

(3.) The other partner or partners shall be at liberty at any time to redeem the interest charged, or in case of a sale being directed, to purchase the same.

(4.) This section shall apply in the case of a cost-book company as if the company were a partnership within the meaning of this Act.

(5.) This section shall not apply to Scotland.

Rules as to interests and duties of partners subject to special agreement.

[Pp. 61—69.]

24. The interests of partners in the partnership property and their rights and duties in relation to the partnership shall be determined, subject to any agreement express or implied between the partners, by the following rules :

(1.) All the partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses whether of capital or otherwise sustained by the firm.

(2.) The firm must indemnify every partner in respect of payments made and personal liabilities incurred by him—

(*a.*) In the ordinary and proper conduct of the business of the firm : or,

(*b.*) In or about anything necessarily done for the preservation of the business or property of the firm.

(3.) A partner making, for the purpose of the partnership, any actual payment or advance beyond the amount of capital which he has agreed to subscribe, is entitled to interest at the rate of five per cent. per annum from the date of the payment or advance.

(4.) A partner is not entitled, before the ascertainment of profits, to interest on the capital subscribed by him.

(5.) Every partner may take part in the management of the partnership business.

(6.) No partner shall be entitled to remuneration for acting in the partnership business.

(7.) No person may be introduced as a partner without the consent of all existing partners.

(8.) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners, but no change may be made in the nature of the partnership business without the consent of all existing partners.

(9.) The partnership books are to be kept at the place of business of the partnership (or the principal place, if there is more than one), and every partner may, when he thinks fit, have access to and inspect and copy any of them.

Expulsion of partner.

25. No majority of the partners can expel any partner unless a power to do so has been conferred by express agreement between the partners.

[Pp. 69, 70.]

Retirement from partnership at will.

26.—(1.) Where no fixed term has been agreed upon for the duration of the partnership, any partner may determine the partnership at any time on giving notice of his intention so to do to all the other partners.

(2.) Where the partnership has originally been constituted by deed, a notice in writing, signed by the partner giving it, shall be sufficient for this purpose.

[Pp. 70—72.]

Where partnership for term is continued over, continuance on old terms presumed.

27.—(1.) Where a partnership entered into for a fixed term is continued after the term has expired, and without any express new agreement, the rights and duties of the partners remain the same as they were at the expiration of the term, so far as is consistent with the incidents of a partnership at will.

(2.) A continuance of the business by the partners or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is presumed to be a continuance of the partnership.

[Pp. 72, 73.]

Duty of partners to render accounts, &c.

28. Partners are bound to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives.

[Pp. 73, 74.]

Accountability

29.—(1.) Every partner must account to the firm for any benefit derived by him without the consent of the other partners from any transaction

Sections 29—35.

of partners for private profits.
[Pp. 74, 75.]

concerning the partnership, or from any use by him of the partnership property name or business connexion.

(2.) This section applies also to transactions undertaken after a partnership has been dissolved by the death of a partner, and before the affairs thereof have been completely wound up, either by any surviving partner or by the representatives of the deceased partner.

Duty of partner not to compete with firm.
[P. 76.]

30. If a partner, without the consent of the other partners, carries on any business of the same nature as and competing with that of the firm, he must account for and pay over to the firm all profits made by him in that business.

Rights of assignee of share in partnership.
[Pp. 76—79.]

31.—(1.) An assignment by any partner of his share in the partnership, either absolute or by way of mortgage or redeemable charge, does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any accounts of the partnership transactions, or to inspect the partnership books, but entitles the assignee only to receive the share of profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by the partners.

(2.) In the case of a dissolution of the partnership, whether as respects all the partners or as respects the assigning partner, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution.

Dissolution of Partnership, and its consequences.

Dissolution by expiration or notice.
[Pp. 80, 81.]

32. Subject to any agreement between the partners, a partnership is dissolved—

(*a.*) If entered into for a fixed term, by the expiration of that term:

(*b.*) If entered into for a single adventure or undertaking, by the termination of that adventure or undertaking:

(*c.*) If entered into for an undefined time, by any partner giving notice to the other or others of his intention to dissolve the partnership.

In the last-mentioned case the partnership is dissolved as from the date mentioned in the notice as the date of dissolution, or, if no date is so mentioned, as from the date of the communication of the notice.

Dissolution by bankruptcy, death, or charge.
[Pp. 81—84.]

33.—(1.) Subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner.

(2.) A partnership may, at the option of the other partners, be dissolved if any partner suffers his share of the partnership property to be charged under this Act for his separate debt.

Dissolution by illegality of partnership.
[Pp. 84, 85.]

34. A partnership is in every case dissolved by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the members of the firm to carry it on in partnership.

Dissolution by the Court.
[Pp. 85—95.]

35. On application by a partner the Court may decree a dissolution of the partnership in any of the following cases:

(*a.*) When a partner is found lunatic by inquisition, or in Scotland by cognition, or is shown to the satisfaction of the Court to be of permanently unsound mind, in either of which cases the application

may be made as well on behalf of that partner by his committee or next friend or person having title to intervene as by any other partner:

(*b.*) When a partner, other than the partner suing, becomes in any other way permanently incapable of performing his part of the partnership contract:

(*c.*) When a partner, other than the partner suing, has been guilty of such conduct as, in the opinion of the Court, regard being had to the nature of the business, is calculated to prejudicially affect the carrying on of the business:

(*d.*) When a partner, other than the partner suing, wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable for the other partner or partners to carry on the business in partnership with him:

(*e.*) When the business of the partnership can only be carried on at a loss:

(*f.*) Whenever in any case circumstances have arisen which, in the opinion of the Court, render it just and equitable that the partnership be dissolved.

Rights of persons dealing with firm against apparent members of firm.

36.—(1.) Where a person deals with a firm after a change in its constitution he is entitled to treat all apparent members of the old firm as still being members of the firm until he has notice of the change.

(2.) An advertisement in the London Gazette as to a firm whose principal place of business is in England or Wales, in the Edinburgh Gazette as to a firm whose principal place of business is in Scotland, and in the Dublin Gazette as to a firm whose principal place of business is in Ireland, shall be notice as to persons who had not dealings with the firm before the date of the dissolution or change so advertised. [Pp. 95—99.]

(3.) The estate of a partner who dies, or who becomes bankrupt, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable for partnership debts contracted after the date of the death, bankruptcy, or retirement respectively.

Right of partners to notify dissolution.

37. On the dissolution of a partnership or retirement of a partner any partner may publicly notify the same, and may require the other partner or partners to concur for that purpose in all necessary or proper acts, if any, which cannot be done without his or their concurrence. [Pp. 99, 100.]

Continuing authority of partners for purposes of winding up.

38. After the dissolution of a partnership the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue notwithstanding the dissolution so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise. [Pp. 100, 101.]

Provided that the firm is in no case bound by the acts of a partner who has become bankrupt; but this proviso does not affect the liability of any person who has after the bankruptcy represented himself or knowingly suffered himself to be represented as a partner of the bankrupt.

Rights of partners as to application of partnership property.

39. On the dissolution of a partnership every partner is entitled, as against the other partners in the firm, and all persons claiming through them in respect of their interests as partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm, and [Pp. 101—104.]

Sections 39—44.

to have the surplus assets after such payment applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners to the firm; and for that purpose any partner or his representatives may on the termination of the partnership apply to the Court to wind up the business and affairs of the firm.

Apportionment of premium where partnership prematurely dissolved.

[Pp. 104—106.]

40. Where one partner has paid a premium to another on entering into a partnership for a fixed term, and the partnership is dissolved before the expiration of that term otherwise than by the death of a partner, the Court may order the repayment of the premium, or of such part thereof as it thinks just, having regard to the terms of the partnership contract and to the length of time during which the partnership has continued; unless

(*a.*) the dissolution is, in the judgment of the Court, wholly or chiefly due to the misconduct of the partner who paid the premium, or

(*b.*) the partnership has been dissolved by an agreement containing no provision for a return of any part of the premium.

Rights where partnership dissolved for fraud or misrepresentation.

[Pp. 106, 107.]

41. Where a partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled—

(*a.*) to a lien on, or right of retention of, the surplus of the partnership assets, after satisfying the partnership liabilities, for any sum of money paid by him for the purchase of a share in the partnership and for any capital contributed by him, and is

(*b.*) to stand in the place of the creditors of the firm for any payments made by him in respect of the partnership liabilities, and

(*c.*) to be indemnified by the person guilty of the fraud or making the representation against all the debts and liabilities of the firm.

Right of outgoing partner in certain cases to share profits made after dissolution.

[Pp. 107—110.]

42.—(1.) Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner or his estate, then, in the absence of any agreement to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since the dissolution as the Court may find to be attributable to the use of his share of the partnership assets, or to interest at the rate of five per cent. per annum on the amount of his share of the partnership assets.

(2.) Provided that where by the partnership contract an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and that option is duly exercised, the estate of the deceased partner, or the outgoing partner or his estate, as the case may be, is not entitled to any further or other share of profits; but if any partner assuming to act in exercise of the option does not in all material respects comply with the terms thereof, he is liable to account under the foregoing provisions of this section.

Retiring or deceased partner's share to be a debt.

[P. 111.]

43. Subject to any agreement between the partners, the amount due from surviving or continuing partners to an outgoing partner or the representatives of a deceased partner in respect of the outgoing or deceased partner's share is a debt accruing at the date of the dissolution or death.

Rule for distribution of

[Pp. 111, 112.]

44. In settling accounts between the partners after a dissolution of partnership, the following rules shall, subject to any agreement, be observed:

Sections 44—50.

(*a.*) Losses, including losses and deficiences of capital, shall be paid first out of profits, next out of capital, and lastly, if necessary, by the partners individually in the proportion in which they were entitled to share profits:

assets on final settlement of accounts.

(*b.*) The assets of the firm including the sums, if any, contributed by the partners to make up losses or deficiencies of capital, shall be applied in the following manner and order:

[Pp. 111, 112.]

1. In paying the debts and liabilities of the firm to persons who are not partners therein:
2. In paying to each partner rateably what is due from the firm to him for advances as distinguished from capital:
3. In paying to each partner rateably what is due from the firm to him in respect of capital:
4. The ultimate residue, if any, shall be divided among the partners in the proportion in which profits are divisible.

Supplemental.

Definitions of "court" and "business."

45. In this Act, unless the contrary intention appears,—

The expression "court" includes every court and judge having jurisdiction in the case:

The expression "business" includes every trade, occupation, or profession.

[Pp. 113—115.]

Saving for rules of equity and common law.

46. The rules of equity and of common law applicable to partnership shall continue in force except so far as they are inconsistent with the express provisions of this Act.

[Pp. 115, 116.]

Provision as to bankruptcy in Scotland.

47.—(1.) In the application of this Act to Scotland the bankruptcy of a firm or of an individual shall mean sequestration under the Bankruptcy (Scotland) Acts, and also in the case of an individual the issue against him of a decree of cessio bonorum.

[Pp. 117, 118.]

(2.) Nothing in this Act shall alter the rules of the law of Scotland relating to the bankruptcy of a firm or of the individual partners thereof.

Repeal.

48. The Acts mentioned in the schedule to this Act are hereby repealed to the extent mentioned in the third column of that schedule.

Commencement of Act.

49. This Act shall come into operation on the first day of January one thousand eight hundred and ninety-one.

Short title.

50. This Act may be cited as the Partnership Act, 1890.

SCHEDULE.

ENACTMENTS REPEALED.

Section 48.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
19 & 20 Vict. c. 60 .	The Mercantile Law Amendment (Scotland) Act, 1856.	Section seven.
19 & 20 Vict. c. 97 .	The Mercantile Law Amendment Act, 1856.	Section four.
28 & 29 Vict. c. 86 .	An Act to amend the law of partnership.	The whole Act.

APPENDIX II.

ADDENDA TO "PARTNERSHIP."

N.B.—*This Addenda does not contain references to the Partnership Act*, 1890, *nor, as a rule, to any new cases which are mentioned in the Notes to that Act.*

Page 72, line 5. After "engaged" add, "although he may be a British subject." *Macartney* v. *Garbutt*, 24 Q. B. D. 368. But this privilege may be lost by an express condition to the contrary made at the time the minister is received. *Ib.*

„ 91, note (*b*). Add and compare *Swaine* v. *Wilson*, 24 Q. B. Div. 252; *Collins* v. *Locke*, 4 App. Ca. 674.

„ 98, note (*l*). Add *The Pharmaceutical Soc.* v. *Wheeldon*, 24 Q. B. D. 683.

„ 106, line 6 from bottom. After (*o*) add, "wholly or in part;" and see *Kearley* v. *Thompson*, 24 Q. B. Div. 742.

„ 113, note (*k*). Add *Kenrick & Co.* v. *Lawrence & Co.*, 25 Q. B. D. p. 106.

„ 114, line 14 *et seq.* As to the right of a person to carry on business in his own name, and to allow other persons to do so, see *Turton* v. *Turton*, 42 Ch. Div. 128; *Tussaud* v. *Tussaud*, 44 Ch. D. 678; and *Lewis's* v. *Lewis*, 45 Ch. D. p. 284.

„ 114, note (*y*). Before *Hendriks* v. *Montagu* add *Tussaud* v. *Tussaud*, 44 Ch. D. 678.

„ 117. After line 12, add, "By 53 Vict. c. 5 (The Lunacy Act, 1890), §§ 30 & 32, certain persons *and their partners* are disqualified from signing lunacy certificates; and by The Companies Winding up Rules, 1890 (rr. 156, 157 and 158), the partners of the liquidator of a company or of a member of the committee of inspection are forbidden to deal with the assets of the company or to derive any profit from any transaction arising in the winding up, without the express sanction of the Court.

Page 140, note (*h*). The statutes mentioned are now repealed and replaced by the Factors Act, 1889 (52 & 53 Vict. c. 45); and, as to Scotland, by the Factors (Scotland) Act, 1890 (53 & 54 Vict. c. 40). Add to the cases quoted, *Cole* v. *North Western Bank*, L. R. 10 C. P. 354.

„ 141, note (*i*). Add *Niemann* v. *Niemann*, 43 Ch. Div. 198.

„ 162, note (*i*), „ 228, note (*a*). Add *Hancock* v. *Smith*, 41 Ch. D. 456. As to the limitations of this doctrine, see *Lister* v. *Stubbs & Co.*, 45 Ch. Div. 1.

„ 163, notes (*k*) and (*l*). Add, *Derry* v. *Peek*, 14 App. Ca. 337.

„ 227. As to the onus upon a creditor, seeking to appropriate payments made by a deceased debtor in a manner greatly to his disadvantage, to show that no appropriation was made by the debtor, see *Lowther* v. *Heaver*, 41 Ch. Div. 248.

„ 228, note (*a*). „ 234, note (*t*). After reference to *Hallett's Estate*, add *Hancock* v. *Smith*, 41 Ch. D. 456.

„ 256, note (*a*). Add *Field* v. *Robins*, 8 A. & E. 90.

„ 261, notes (*d*) and (*g*). „ 509. 9 Geo. 4, c. 14, § 1, has been amended by the Statute Law Revision Act, 1890, 53 & 54 Vict. c. 33.

„ 266, line 14. After "properly appeared," add, "or if none of them have appeared after proper service." See *Alden* v. *Beckley & Co.*, 25 Q. B. D. 543; and cases in notes (*q*) and (*r*).

266, line 15. After "but not," *read*, "if some only have appeared" (*r*).

„ 266, last line. A debt due from a firm under a judgment recovered against it in its mercantile name can now be attached under a garnishee order. See R. S. C., Order XLV., r. 10.

„ 274, line 5. For "they have been indorsed," *read* "the only or last indorsement is an indorsement;" and add a reference to the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), § 8 (3).

„ 276, last line. If the bill or note is signed in the firm name, and that name includes the name of a person who is not liable as a partner, it seems no longer necessary for such person to be a party to an action on the bill or note. See Bills of Exchange Act (45 & 46 Vict. c. 61) § 23 (2).

Page 285, line 9. An assignment by way of mortgage is an absolute assignment within the meaning of § 25, cl. 6, of the Judicature Act, 1873. *Tancred* v. *Delagoa Bay, &c., Co.*, 23 Q. B. D. 239.

„ 296, note (*s*). Add, reference to *Government of Newfoundland* v. *Newfoundland Rail. Co.*, 13 App. Ca. 199.

„ 299. As to execution against partners on a judgment against a firm, see *Davies & Co.* v. *André & Co.*, 24 Q. B. Div. p. 608; and also *Alden* v. *Beckley & Co.*, 25 Q. B. D. 543.

„ 307, note (*r*). Add "But the principal cannot follow the investments made by the agent by means of such profits": see *Lister & Co.* v. *Stubbs*, 45 Ch. Div. 1. See also *Boston Deep Sea Fishing Co.* v. *Ansell*, 39 Ch. Div. 369.

„ 344, line 3. After "debts" add "nor."

„ 369, note (*i*)
„ 481, note (*p*)
„ 484, note (*a*) } *Newbigging* v. *Adam* is now reported on appeal, 13 App. Ca. 308.

„ 372, note (*x*). Add "See also *Re Earl of Winchilsea's Policy Trusts*, 39 Ch. D. 168."

„ 394, note (*c*). *Colquhoun* v. *Brooks* is now reported on appeal in 14 App. Ca. 493. See also *Werle & Co.* v. *Colquhoun*, 20 Q. B. Div. 753, and *The New York Life Insurance Co.* v. *Styles*, 14 App. Ca. 381.

„ 401, note (*d*). See also *Lee* v. *Neuchatel Asphalte Co.*, 41 Ch. Div. p. 23.

„ 409, note (*k*). As to the different weight to be attached to a course of practice in a large company and in an ordinary partnership, see *Re Frank Mills Mining Co.*, 23 Ch. D. at p. 56.

„ 429, line 19. After "paid" add "But notwithstanding an agreement for the division of the partnership property, the court can order a sale if that appears to be most beneficial to the parties. It will also appoint a receiver and manager until sale: *Taylor* v. *Neate*, 39 Ch. D. 538."

„ 433, note (*s*), 559. Qu. whether damages can be recovered from the estate of a deceased partner if his executors do not join the partnership in accordance with a covenant entered into by their testator: see *Downs* v. *Collins*, 6 Ha. 418.

„ 439, note (*a*). As to whether the transfer of the goodwill of a solicitor's business passes the custody of his clients' papers, see *James* v. *James & Bendall*, 22 Q. B. D. 669, note p. 675: this case was affirmed on another point, 23 ib. 12.

Page 439, note (*a*). Add "And now an agreement for its sale must bear an *ad valorem* stamp. See Revenue Act, 1889 (52 & 53 Vict. c. 42), § 15, which alters the law declared by *Commissioners of the Inland Revenue* v. *Angus & Co.*, 23 Q. B. Div. 579."

„ 440, note (*q*). Add "*Re Irish*, 40 Ch. D. 49, where on a sale by the court, the receiver and manager who had been carrying on the business until sale was not restrained from soliciting custom."

„ 441, note (*i*). Add "*Turton* v. *Turton*, 42 Ch. Div. 128; *Tussaud* v. *Tussaud*, 44 Ch. D. 678. In *Vernon* v. *Hallam*, 34 Ch. D. 748, there was a covenant not to carry on business under a particular name, which happened to be that of the defendant."

„ 446, line 7 *et seq.* A partner who has purchased his co-partner's share in the partnership, but has not bought the goodwill of the business nor the right to continue to use the partnership name, will not be restrained from selling the existing stock which bears the name of the firm. See *Gray* v. *Smith*, 43 Ch. Div. p. 221.

„ 446, line 15. After (*m*), Add "but not the right to expose him to any risk by so doing: *Thynne* v. *Shove*, 45 Ch. D. 577."

„ 452, paragraph 2 „ 515. 17 & 18 Vict. c. 125, § 11, is now repealed, and is replaced by the Arbitration Act, 1889 (52 & 53 Vict. c. 49). See Annual Practice, 1890—91, p. 147 *et seq.*

„ 453, note (*v*). Add *Turncock* v. *Sartoris*, 43 Ch. Div. 150.

„ 453, line 12. After "commenced" add "where the point in dispute was really a question of law: *Re Carlisle*, 44 Ch. D. 200; *Lyon* v. *Johnson*, 40 Ch. D. 579; where one party was not willing to refer the whole dispute to arbitration: *Davis* v. *Starr*, 41 Ch. Div. 242. See also *Farrar* v. *Cooper*, 44 Ch. D. 323."

The Arbitration Act, 1889, does not seem to have materially altered the law as stated in the above page of the Partnership volume.

„ 480, note (*l*). Add "but statements as to the existence of a particular intention may be statements of a fact: *Edgington* v. *Fitzmaurice*, 29 Ch. Div. 459; *R.* v. *Gordon*, 23 Q. B. D. 354."

„ 480, note (*m*) „ 481, note (*p*) Add *Derry* v. *Peek*, 14 App. Ca. 337.

„ 484, note (*a*). The question as to the extent of the right to indemnity was not decided in the House of Lords in *Adam* v. *Newbigging*, 13 App. Ca. 308.

Page 504, line 16. Add "but may be compelled to produce them after the hearing: see *Turney* v. *Bayley*, 34 Beav. 105."

„ 510, note (*s*). Add *Barton* v. *North Staffordshire Ry. Co.*, 38 Ch. D. 458.

„ 538, note (*b*). § 56 of the Jud: Act, 1873, has been amended, and § 57 repealed by the Arbitration Act, 1889, 52 & 53 Vict. c. 49.

„ 546, line 15. After "decided" add note. See, however, *Manchester & Liverpool District Banking Co.* v. *Parkinson*, 22 Q. B. Div. 173.

„ 545,
„ 548 note (*k*)
„ 555 note (*h*) } Add *Taylor* v. *Neate*, 39 Ch. D. 538.

„ 554, line 8. After Court add "The receiver cannot, however, present a petition in Bankruptcy: *Re Sacker*, 22 Q. B. Div. 179. The Court cannot authorise a receiver to do anything which it cannot authorise one partner to do against the will of the other: *Niemann* v. *Niemann*, 43 Ch. Div. 198."

„ 557, line 7. After "may" insert "not."

„ 579, last line. The Lunacy Regulation Act, 16 & 17 Vict. c. 70, § 123, is now repealed and is replaced by § 119 of the Lunacy Act, 1890 (53 Vict. c. 5).

„ 590, note (*a*). The reference to *Crawford* v. *Hamilton* should be 4 Madd. 251.

„ 607, note (*z*),
„ 609, note (*d*). } Add *Re Gorton*, 40 Ch. Div. 536.

„ 609, note (*f*). The reference to *Re Johnson* is 15 Ch. D. 548.

„ 625, last line but 3. } Add reference to *Ex parte Foley*, 24 Q. B. Div. 729.

„ 626,
„ 665, note (*x*). } § 4 (*e*) is now repealed and replaced by § 1 of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71).

„ 633, line 15. After "debt" add "And no order will be made upon a joint petition where the debtors are neither partners nor joint debtors: *Re Bond*, 22 Q. B. D. 17."

„ 646, line 18, after (*c*).
„ 665. } Add "But dealings by a bankrupt with property acquired by him after adjudication *bonâ fide* and for value, are valid until the trustee intervenes: *Cohen* v. *Mitchell*, 25 Q. B. Div. 262."

„ 651, note (*f*),
„ 652, note (*t*). } § 55 is amended by § 13 of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71).

Page 654, note (*l*), „ 675, paragraph 2. — Sub-sections 1 & 2 of § 46 of the Bankruptcy Act, 1883, are now repealed and replaced by § 11 of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71).

„ 708, note (*x*), „ 751, note (*m*). — *Morgan* v. *Hardy* is now reported on appeal in 13 App. Ca. 351, sub nom. *Hardy* v. *Fothergill*.

„ 709, note (*z*). Section 42 of the Bankruptcy Act, 1883, is amended by § 28 of the Bankruptcy Act, 1890, and § 40 (1) by the Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62), which see; and as to Ireland see the Preferential Payments in Bankruptcy (Ireland) Act, 1889 (52 & 53 Vict. c. 60).

„ 719, line 22, „ 730, line 5. — As to Interest see now § 23 of the Bankruptcy Act, 1890.

„ 751, line 12. Add note (*kk*) see further as to a bankrupt's discharge Bankruptcy Act, 1890, § 8: Section 28 of the Act of 1883 is now repealed.

„ 751, last lines. — See also Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), § 10.

„ 754, *et seq.* See now, as to compositions and schemes of arrangement, Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), § 3, which replaces the main provisions of the Act of 1883.

„ 754, note (*h*), „ 755, note (*k*). — § 23 (1) of the Bankruptcy Act, 1883, has been amended by the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), § 6.

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